89-1235

Supreme Court, U.S.
FILED
FEB 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court Of The United States

October Term, 1989

DONALD B. AND CAMILIA S. LANDER,
Petitioners

vs.

THE STATE OF ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

DAVID S. LUKER
Luker and Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

Attorney for Petitioners Lander

OF COUNSEL:

Tamera K. Erskine
Luker & Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, Alabama 35203
(205) 251-6666

QUESTIONS FOR REVIEW

I. WHETHER THE PETITIONERS WERE DENIED EQUAL PROTECTION OF THE LAW DUE TO THE STATE OF ALABAMA'S FAILURE TO FOLLOW THEIR OWN STATE LAWS ON CONSTRUCTIVE POSSESSION OF CONTROLLED SUBSTANCES.

TABLE OF CONTENTS

page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. Whether The Petitioners Were Denied Equal Protection Of The Law Due To The State Of Alabama's Failure To Follow Their Own Laws. 5

A. Petitioners Were Denied Equal Protection Of The Law Due To The State Of Alabama's Failure To Follow Their Own Laws On Constructive Possession Of Controlled Substances. 7

1. Facts 7

2. Deprivation Of Equal Protection Of The Law By The Trial Court's Denying The Defendants' Motion For A Judgment Of Acquittal And The Appellate Courts' Affirmance Of The Trial Court. 8

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: *Pages*

Campbell v. State,
439 So.2d 718 (Ala.Cr.App.), *rev'd on other grounds*, 439 So.2d 723 (Ala. 1983) 6, 8, 10

Coker v. State,
25 Ala.App. 191, 143 So. 206 (1932) 10

Cook v. State,
341 So.2d 183 (Ala.Cr.App. 1977) 6, 10

Collins v. State,
391 So.2d 1078 (Ala.Cr.App. 1979) 10

Crafts v. State,
439 So.2d 1323 (Ala.Cr.App. 1983) 12-16

DeGruy v. State,
56 Ala.App. 521, 323 So.2d 406, *cert. denied*, 295 Ala. 399, 323 So.2d 411 (1975) 6, 10

Donahoo v. State,
505 So.2d 1067 (Ala.Cr.App. 1986) 11

German v. State,
429 So.2d 1138 (Ala.Cr.App. 1983) 6, 10, 14

Grubbs v. State,
462 So.2d 995 (Ala.Cr.App. 1984) 10

Hill v. State,
394 So.2d 106 (Ala.Cr.App. 1981) 8

Korreckt v. State,
507 So.2d 558 (Ala.Cr.App. 1986) 11

Lee v. State,
350 So.2d 743 (Ala.Cr.App. 1977) 10

Lukes v. Alabama Power Company,
57 Ala. 590, 593, 60 So.2d 349 (1952) 9

McCord v. State,
373 So.2d 1241 (Ala.Cr.App. 1979) 10

TABLE OF AUTHORITIES — (Continued)

Cases: *Pages*

Puckett v. State,
13 Md.App. 584, 284 A.2d 252 (1971) 15

Roberts v. State,
349 So.2d at 91 (Ala.Cr.App.). *cert. denied,*
Ex parte Roberts, 349 So.2d (Ala. 1977) 15

Scrafford v. State,
414 So.2d 179 (Ala.Cr.App. 1982) 10

State of Louisiana v. Resweber,
67 S.Ct. 374 at 377 16

Temple v. State,
366 So.2d 740 (Ala.Cr.App. 1978) 10, 11

Thomas v. State,
363 So.2d 1020 (Ala.Cr.App. 1978) 16

White v. State,
479 So.2d 1368 (Ala.Cr.App. 1985) 10

Withers v. State,
120 Ala. 394, 25 So. 568 (1898) 9

Woolridge v. State,
489 So.2d 703 (Ala.Cr.App. 1986) 12

Yarbrough v. State,
405 So.2d 721 (Ala.Cr.App.), *cert. denied,*
405 So.2d 725 (Ala. 1981) 6, 10

Constitutional Provisions:

The United States Constitution,
Fourteenth Amendment 2, 6

Statutes:

Code of Alabama, (1975) Section 35-4-27 9

No. _____

IN THE

Supreme Court Of The United States

October Term, 1989

DONALD B. AND CAMILIA S. LANDER,
Petitioners

vs.

THE STATE OF ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Petitioners[1] respectfully pray that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court on December 1, 1989, denying review of the issues raised concerning their convictions in this case, previously affirmed with opinion by the Alabama Court of Criminal Appeals by Judgment of May 26, 1989.

[1]Petitioners' undersigned counsel respectfully submits that to the best of his knowledge the style of this case accurately reflects all parties having an interest in its outcome.

OPINIONS BELOW

Petitioners timely appealed their judgments of convictions and sentences to the Alabama Court of Criminal Appeals. By Judgment of May 26, 1989, the Alabama Court of Criminal Appeals affirmed their convictions and sentences with an opinion. Petitioners timely filed an Application for Rehearing in the Alabama Court of Criminal Appeals. This Application for Rehearing was denied without opinion by the Alabama Court of Criminal Appeals on June 30, 1989.

Petitioners timely filed a Petition for Writ of Certiorari to review the Judgment of the Alabama Court of Criminal Appeals in the Alabama Supreme Court. The Alabama Supreme Court by order of December 1, 1989, denied the Writ.

These orders appear in full in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3). This Petition was timely filed within sixty days of the date of the Alabama Supreme Court's Judgment and Order of December 1, 1989.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

On August 24, 1987 at approximately 2:00 p.m. agents with the Alabama Bureau of Investigation were involved in a routine flight from Montgomery to Perry County. While passing over land in Autauga County, they observed what to

them appeared to be marijuana plants. (Vol. I, RT-11).[2] As a result of their observation, marijuana was seized on August 24, 1987, and a search was executed on August 25 on the residence of Donald B. and Camilia S. Lander, the Petitioners herein. (Vol. I, CR-11 through CR-13). The fruits of this search were later suppressed by the trial court. (Vol. I, CR-86 through CR-87). As a result of the observation and seizure from the field, Donald B. Lander and Camilia S. Lander were arrested on October 20, 1987, and indicted by the Autauga County Grand Jury on February 12, 1988, and charged with trafficking in marijuana. (Vol. I, CR-33 to CR-36). The Petitioners were arraigned on March 8, 1988, and the case was set for trial on May 10, 1988. The cases were consolidated for purposes of trial, and the case was tried on May 10, 11, and 12. On May 12, 1988, the jury returned a guilty verdict against both defendants. (Vol. I, CR-190 to CR-191). During the trial of this case, testimony was elicited from ABI pilot Roy Sumja, who said that he observed marijuana on the ground from his position in the helicopter. (Vol. I, RT-11). Agent Sumja stated that he did not apprehend or see anyone in the field. (Vol. I, RT-18 through RT-19). Alabama Bureau of Investigation Agent Charles West testified, and during his testimony, he stated that he did not see either defendant during his investigation of the field of marijuana, either at home or in the woods. (Vol. I, RT-64, Vol. II, RT-162). However, he did testify that he had found a paper bag inside a drying shed in the woods. The bag had the letters "CAM" written on it. (Vol. II, RT-86). He also testified that while he was gathering the marijuana plants, he found a yellow jacket with the name "Don L." on the back in the woods that was dirty and on the ground in a wet condition. (Vol. II, RT-79). He testified that there were trails between the different plots of marijuana, and what appeared to be a trail in the direction of the house. (Vol. I, RT-68). Agent West testified that he had no photographs, statements,

---

[2] The record in this case consists of a two volume trial transcript, exhibits and pleadings numbered sequentially. The Petitioners refer to the trial record as "RT-" and to the clerk's record as "CR-". Where materials referenced also appear in the Appendix to this Petition, that fact is noted.

fingerprints, or other evidence that would link the defendants to the marijuana. (Vol. II, RT-83 through RT-84, RT-123 through RT-124, RT-228, RT-137 through RT-234). The Defendant Donald B. Lander took the stand and testified that he had no knowledge of the marijuana, and that it did not belong to him. (Vol. II, RT-272). Mr. Lander also testified that he had in the past been given yellow rain slickers in his job as a construction worker, similar to the one that Agent West found, and that he kept them in his yard and in his storage shed, and that the one found in the field could have possibly been his. (Vol. II, RT-274).

Defendant Camilia S. Lander took the stand and testified that she had no knowledge of the marijuana, and that it did not belong to her. (Vol. II, RT-298). Mrs. Lander stated that she stored bags from WalMart and other such paper bags in her house and in her shed, and that the bag found in the drying shed could possibly have been hers. (Vol. II, RT-295 to RT-297). Both defendants denied knowledge of the marijuana or any involvement with it. (Vol. II, RT-272 through RT-298). At the close of the State's case, the Defendants moved for a Motion for Judgment of Acquittal on the grounds that the State failed to prove a prima facie case, and that they failed to prove the elements of constructive possession as required by Alabama law. (Vol. II, RT-236 through RT-247). The trial judge denied the Defendants' Motion stating: "The State's case is hanging by a very very thin thread. But I find that there is a thread that enables them to overcome a motion for judgment of acquittal." (Vol. II, RT-247). At the close of the Defendants' case, the jury returned a verdict of guilty against both Donald B. and Camilia S. Lander. (Vol. II, CR-190 through CR-191). The case was continued for presentencing investigation to the 24th of June, 1988, at which time the Honorable Judge John B. Bush sentenced Donald B. Lander to Fifteen (15) years in the penitentiary, assessed a Twenty-Five Thousand Dollar ($25,000.00) fine, and ordered Fifteen Hundred Dollars ($1,500.00) to be paid to the Victim's Compensation Crime Fund. The Honorable Judge Bush sentenced Camilia S. Lander to Five (5) years in the penitentiary, assessed a

Twenty-Five Thousand Dollar ($25,000.00) fine, and ordered her to pay Fifteen Hundred Dollars ($1,500.00) to the Victim's Compensation Crime Fund. (Vol. 1, CR-192 through CR-195). On the 24th of June, 1988, the Defendants perfected an Appeal Bond in the above styled case. (Vol. 1, CR-196 through CR-197). The Defendants then filed a Motion for a New Trial on the 24th of June, 1988, which was denied on August 9, 1988. (Vol. 1, CR-198 through CR-205). The Petitioners timely filed an Appeal to the Alabama Court of Criminal Appeals on January 3, 1989, and the Alabama Court of Criminal Appeals affirmed the trial court in a written opinion released on May 26, 1989. (Appendix hereto). The Petitioners timely filed an Application for Rehearing, which was denied without opinion on June 30, 1989. (Appendix hereto). The Petitioners then timely filed a Petition for Writ of Certiorari to the Alabama Supreme Court, which was denied without opinion December 1, 1989. (Appendix hereto).

REASONS FOR GRANTING THE WRIT

I. Petitioners Were Denied Equal Protection Of The Law Due To The State Of Alabama's Failure To Follow Their Own State Law On Constructive Possession Of Controlled Substances.

The Petitioners submit that the record is clear that they were deprived of the equal protection of the law throughout the course of the proceedings against them. Specifically, the Petitioners assert that they were denied the equal protection of the law through the failure of the State of Alabama to follow their own state law on constructive possession of controlled substances. "It is doubtless true that the State may act through different agencies, ------ either by its legislative, its executive, or its judicial authorities; and the prohibition of the amendments extend to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies, or by another." *Shelley v. Kraemer*, 68 S.Ct. 836 at 842 (1948) citing *Commonwealth of Virginia v. Rives*, 1880, 100 U.S. 113, 118, 25 L.Ed. 667. In *Twining v. New Jersey*,

1908, 211 U.S. 78, 90, 91, 29 S.Ct. 14, 16, 53 L.Ed. 97, the Court said: "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." *Shelley, supra*, went on to state: "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of State power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Shelley* at 845. The Alabama Supreme Court and the Alabama Court of Criminal Appeals have judicially and authoritatively construed and enforced the laws of the State of Alabama with respect to constructive possession. The essential elements necessary for the proof of possession of controlled substances in Alabama are:

1. Actual or potential physical control;
2. Intention to exercise dominion;
3. External manifestations of intent and control.

Cook v. State, 341 So.2d 183 (Ala.Cr.App. 1977); *DeGray v. State*, 56 Ala.App. 521, 323 So.2d 406, *cert. denied*, 295 Ala. 399, 323 So.2d 411 (1975); *German v. State*, 429 So.2d 1138 (Ala.Cr.App. 1983). When constructive possession is relied on, a fourth element, that of knowledge of the presence of the controlled substances, must be proven beyond a reasonable doubt. *Campbell v. State*, 439 So.2d 718 (Ala.Cr.App.), *rev'd on other grounds*, 439 So.2d 723 (Ala. 1983); *Yarbrough v. State*, 405 So.2d 721 (Ala.Cr.App.), *cert. denied*, 405 So.2d 725 (Ala. 1981). The Alabama Supreme Court, by denying the Appellants' Petition for Writ of Certiorari, and the Alabama Court of Criminal Appeals, in issuing an opinion in conflict with the above construction and progeny of Alabama state law, denied the Petitioners the equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

A. Petitioners Were Denied Equal Protection Of The Law Due To The State Of Alabama's Failure To Follow Their Own Laws On Constructive Possession Of Controlled Substances.

1. *Facts*

On August 24, 1987, while passing over land in Autauga County, agents with the Alabama Bureau of Investigation observed what to them appeared to be marijuana. (Vol. I, RT-11). As a result of their observation, marijuana was seized on August 24, 1987, and the owners of the land, Donald B. and Camilia S. Lander were arrested on October 20, 1987. During the trial of this case, ABI pilot Roy Sumja, testified that he did not apprehend or see anyone in the field. (Vol. I, RT-18 through RT-19). ABI Agent Charles West testified that he did not see either Defendant during his investigation of the field of marijuana either at home or in the woods. (Vol. I, RT-64, Vol. II, RT-162). He further testified that he found a paper bag inside a drying shed in the woods, and that the bag had the letters "CAM" on it. (Vol. II, RT-86). He also testified that he found a yellow jacket that was dirty and in a wet condition in the woods. The jacket had the name "Don L." written on the back. (Vol. II, RT-97). He testified that there were trails between the different plots of marijuana and what appeared to be a trail in the direction of the house. (Vol. I, RT-68). He stated that he had no photographs, statements, fingerprints or other evidence that would link the Defendants to the marijuana. (Vol. II, RT-83 through RT-84, RT-123 through RT-124, RT-228, RT-137 through RT-234). After the State rested, the Defendants made a Motion for Judgment of Acquittal in that the State had failed to prove a prima facie case of constructive possession. The trial court overruled the Defendants' Motion observing: "The State's case is hanging by a very, very thin thread. But I find that there is a thread that enables them to overcome a Motion for Judgment of Acquittal." (Vol. II, RT-247). Because the trial court and the appellate court failed to apply the Alabama laws of constructive possession to the Petitioners' case, the Petitioners were

denied the Equal Protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

2. *Deprivation Of Equal Protection Of The Law By The Trial Court's Denying The Defendants' Motion For Judgment Of Acquittal And The Appellate Court's Affirmance Of The Trial Court.*

The State of Alabama failed to prove a prima facie case of constructive possession against the Defendants. There was no proof of ownership, no proof of exclusive possession, no fingerprints, or surveillance at the time of the seizure, nor was anyone ever seen at or near the marijuana plants. Before a person can be convicted of trafficking in cannabis, the State must prove beyond a reasonable doubt that he was in actual or constructive possession of the substance. In this case, there was no actual possession, so the State must have proved constructive possession. The legal definition of "constructive possession" is: "a phrase used in the law to characterize an act, not amounting to an actual appropriation of property, but which shows an intention to convert it to one's own use." In Alabama, constructive possession arises only where the illegal substance is found on the *premises of or controlled by the accused*. (emphasis added). *Campbell, supra; Williams v. State*,340 So.2d 1144 (Ala.Cr.App. 1976), *cert. denied*, 340 So.2d 1149 (Ala. 1977). In the case at bar, the State failed to prove ownership of the property. Ownership and possession of land must be proved by evidence as other facts are proved, and neither can be proved by general notoriety, nor by reputation. The State attempted to prove ownership through probate records of a copy of a quit claim issued to the Defendants. (Vol. I, RT-46 to RT-51). Through testimony of Ms. Betty Ward, a probate clerk, a certified *copy of a copy* of a quit claim deed was introduced (Vol. I, RT-48) over the objection of the Defendants. (Vol. I, RT-49). The objection was based on no proper predicate being laid and the Best Evidence Rule, and should have been sustained. As *Hill v. State*, 394 So.2d 106 (Ala.Cr.App. 1981), notes, "parole evidence is inadmissible to show title for ownership of real property, when such ownership is based on title deeds,

without first having laid a predicate for its introduction." *Hill, supra*, citing *Withers v. State*, 120 Ala. 394, 25 So. 568 (1898). The Court of Criminal Appeals in its written opinion found that in the present case, ownership of the property was proven. On Page 5 of its written opinion, (See Appendix) the Court stated as follows: "Here a copy of a quit claim deed was properly admitted into evidence, *Lukes v. Alabama Power Company*, 57 Ala. 590, 593, 60 So.2d 349 (1952); Ala.Code 1975, Sec. 35-4-27." It is clear from the testimony, however, that a copy of a quit claim deed was not introduced, but a *copy of a copy* of the quit claim deed was introduced. (Vol. I, RT-48). McElroy's *Alabama Evidence* Section 226.02 states as follows:

> If the party's claim of ownership of land is disputed by an adverse claimant thereto, oral testimony that the party owns the land, or as to the contents of deeds and instruments of conveyance to him, is not admissible without production, or showing an excuse for nonproduction, *of the original document or a duly authenticated copy* of the probate judge's record thereof if such copy is obtainable. (emphasis added)

In this case, no proper predicate had been laid, nor does a *copy of a copy* meet the standards of McElroy's. The Court of Criminal Appeals said, "Because the claim of ownership was not disputed, oral testimony was admissible to prove that fact." (page 5). The claim of ownership, however, was *highly* disputed as can be seen from the transcript, and the Landers' argument in favor of their Motion for Judgment of Acquittal. (Vol. II, RT-236 to RT-247). The Court of Criminal Appeals also said that "At trial, both Defendants testified and admitted ownership of the property involved." (page 5). However, only evidence that has been presented at the time that the Motion for Judgment of Acquittal is made should be taken into consideration in granting or overruling the motion. At the time the Motion for Judgment of Acquittal was made, the Landers had not testified to anything or admitted ownership of the property.

Even had the State proved ownership, they still failed to show a prima facie case of constructive possession. There was

no proof of exclusive possession by the Defendants, no fingerprints (Vol. II, RT-123 to RT-124, RT-149 to RT-162, RT-228 to RT-238), no surveillance at the time of the discovery, (Vol. II, RT-162, RT-166 through RT-172), and no one was ever seen at or near the marijuana (Vol. I, RT-18 to RT-19, Vol. II, RT-167 to RT-172, RT-207 to RT-214). There was insufficient evidence to meet the standards for constructive possession. In 1977, the Alabama Court of Criminal Appeals in *Cook v. State*, 341 So.2d 183 (Ala.Cr.App. 1977), citing *DeGruy v. State*, 56 Ala.App. 521, 323 So.2d 406, *cert. denied*, 295 Ala. 399, 323 So.2d 411 (1975), set forth the three essential elements necessary for the proof of possession of controlled substances. The elements are:

1. actual or potential physical control;
2. intention to exercise dominion; and
3. external manifestations of intent and control.

See also, *Franklin v. State*, 437 So.2d 609 (Ala.Cr.App. 1983); *German v. State*, 429 So.2d 1138 (Ala.Cr.App. 1983); *Scrafford v. State*, 414 So.2d 179 (Ala.Cr.App. 1981); *Collins v. State*, 391 So.2d 1078 (Ala.Cr.App. 1979); *McCord v. State*, 373 So.2d 1241 (Ala.Cr.App. 1979); *Williams v. State*, 340 So.2d 1144 (Ala.Cr.App.), *cert. denied*, 340 So.2d 1149 (1977); *Lee v. State*, 350 So.2d 743 (Ala.Cr.App. 1977). When constructive possession is relied on, the prosecution must meet a heavy burden; they must prove beyond a reasonable doubt that the accused had knowledge of the presence of the controlled substances. *Campbell, supra; Yarbrough v. State*, 405 So.2d 721 (Ala.Cr.App.), *cert. denied*, 405 So.2d 725 (Ala. 1981); *Grubbs v. State*, 462 So.2d 995 (Ala.Cr.App. 1984); *White v. State*, 479 So.2d 1368 (Ala.Cr.App. 1985). Proof of constructive possession alone will not justify a conviction. *Cook, supra; Coker v. State*, 25 Ala.App. 191, 143 So. 206 (1932). "The fundamental purpose of the knowledge requirement is founded on the legal theory that a person is cloaked with a presumption of innocence until proven guilty, and, consequently, the State, to obtain a conviction, must show that the evidence excludes all rational conclusions except that of the Defendant's guilt." *Temple v. State*, 366 So.2d 740 (Ala.Cr.App. 1978).

Knowlege can be inferred from the accused's exclusive possession, ownership, and control. *Temple, supra.* There was testimony that the Defendants had had trespassers on their property from time to time and that some things had come up missing from the farrowing shed. (Vol. II, RT-277 to RT-278 and RT-287 to RT-288). That shows that the Defendants did not have exclusive possession, ownership, and control of the premises. The State did not attempt to prove otherwise. *Temple, supra,* goes on to state that when the accused does not have exclusive possession of the premises where a controlled substance is found, some other corroborating circumstances must exist before the accused can be convicted of illegal possession. "Where a person is in possession, but not exclusive possession of the premises, it may not be inferred that he knew of the presence of any controlled substance found there unless there are other circumstances tending to buttress this inference." *Korreckt v. State,* 507 So.2d 558 (Ala.Cr.App. 1986); *Temple, surpa.* Some evidence that connects the accused with the contraband is required. Guilty knowledge can be proved by evidence of acts, or conduct of accused, from which it may be fairly inferred that he knew of the existence of the contraband at the place where it was found. *Donahoo v. State,* 505 So.2d 1067 (Ala.Cr.App. 1986). The only evidence that even remotely connects the Defendants in this case to the marijuana is a dispute over some trails in the densely wooded area where the plots were found. (Vol. II, RT-253 to RT-268). The only attempt the State made to show evidence of trails was through the testimony of ABI Agent Charles West and ex-agent, Stephen Lindsay. The trails they testified to were in an admittedly rural, marshy, densley-wooded area, where a machete was necessary to cut through the growth. (Vol. I, RT-31 to RT-32, RT-68, Vol. II, RT-102 to RT-105, RT-156 to RT-159, RT-197, RT-204). There were also many animals in the woods. (Vol. II, RT-156 to RT-159). There were not, however, any pictures, notes, diagrams or contemporaneous records to show the location or existence of the "trails". (Vol. II, RT-83 to RT-85, RT-159 to RT-161). This testimony was insufficient to show constructive possession or knowledge.

There was a raincoat and a paper bag that could have belonged to the Defendants found near the scene of the seizure, both of which were like numerous similar items used in and around the Defendants' home and farrowing shed, and were accessible to outsiders. (Vol. II, RT-274 to RT-276, RT-286 to RT-287, RT-297 to RT-298). The State attempted to show knowledge through these two items. Once again, however, there was a notable lack of detail and accuracy surrounding the items. Although numerous pictures were taken at the scene of the seizure and introduced as evidence, no pictures, notes, drawings or contemporaneous records were made regarding the two key pieces of evidence which could have linked the Defendants to the marijuana. (Vol. II, RT-83 to RT-84, RT-113 to RT-118, RT-121, RT-128 to RT-130, RT-138 to RT-141, RT-143 to RT-156, RT-160 to RT-161). In fact, the ABI agents defaced, altered and commingled the paper bags and wrote prejudicial remarks on them. (Vol. II, RT-87, RT-89 to RT-90). Despite the numerous objections of Defendants' counsel, these items were allowed into evidence. (Vol. II, RT-84, RT-87, RT-90, RT-112, RT-121).

The State failed in every respect to prove a prima facie case of constructive possession. The case at bar is similar to *Woolridge v. State*, 489 So.2d 703 (Ala.Cr.App. 1986); and *Crafts v. State*, 439 So.2d 1323 (Ala.Cr.App. 1983). In *Woolridge, supra*, several trails led from the defendant's trailer to woods where marijuana was discovered growing. Seeds were found in an oil can near the edge of the field about 75 yards from the trailer. There were also some scales and pills found inside the trailer. No one was ever found at the trailer or near the plot. The Court of Criminal Appeals held that there was insufficient evidence to establish that the defendant was in constructive possession of the contraband. The instant case does not even rise to the level of *Woolridge, supra*. The "trails" are disputed and there was no clear evidence that they existed. The marijuana was much farther away from the house (Vol I. RT-67 and Vol. II, RT-258), two hundred yards as compared to seventy-five, and in a densely-wooded area, and the only evidence even remotely linking is the raincoat and paper bag.

In *Crafts, supra,* the Court of Criminal Appeals again held that evidence was insufficient to convict the defendant. The local sheriff had been informed that the defendant was dealing in marijuana. A marijuana field was discovered in an aerial survey behind a barn, approximately 125-150 feet from the defendant's back porch. The defendant was not at home at the time of the seizure and was never seen at home or near the marijuana. The marijuana was growing in between corn plants in the garden, and several plants were drying at the edge of the woods, twenty to fifty feet behind the garden. The Court said that "the evidence is notable for its lack of detail and for the absence of information connecting the defendant with the growing marijuana." *Crafts, supra,* at p. 1324. "Reduced to fundamentals, all the State showed was that the defendant's residence abutted land on which marijuana was growing." *Crafts, supra,* at p. 1325.

> Here, there was no showing that the marijuana plants were growing on the defendant's exclusively owned and occupied residential lot . . . There was no showing that the defendant owned and was in exclusive possession of the property on which the marijuana was growing . . . *At best, the testimony in this case merely raises a suspicion that the marijuana belonged to the defendant . . . No rule is more fundamental or better settled than that convictions cannot be predicated upon surmises, speculation, and suspicion to establish the accused's criminal agency in the offense charged* . . . Here the fact that the marijuana plants were in close proximity to the defendant's residence and the Sheriff's testimony that he had been told that the defendant had been dealing in marijuana *merely showed a possibility that this defendant may have committed the offense. "However, the possibility that a thing may occur is not alone evidence, even circumstantially, that the thing did occur."* . . . Here, the facts and circumstances only give rise to a suspicion of guilt and are insufficient to support the conviction. *Crafts, supra,* at p. 1325 (emphasis added).

Finally, the Court held that "although the evidence may have been sufficient to show potential control, there was no

showing of the defendant's intention to exercise dominion and external manifestation of intent and control." *Crafts, supra,* at p. 1325. In *Crafts,* there was a foot or two between the garden and the area of the yard, and there was also evidence that the Defendant had been dealing in marijuana. In the instant case, there are no allegations of the Landers dealing in marijuana, nor is the proximity between the Lander's usable portion of the land and the marijuana plants nearly as close as "a foot or two" as in *Crafts.* In addition, no one was at home at the time of the seizure. (Vol. I, RT-64). The Defendants' convictions were based on speculation, suspicion and surmise, which as noted above, is insufficient to support a conviction. Other than the raincoat and the paper bag, there is no evidence to connect the Defendants with the marijuana. Both of these items are innocent and do not tend to support guilt. Raincoats and paper bags have no particular connection to cultivating marijuana, and are items used by people everyday in their ordinary course of business. They are not incriminating items special to the marijuana trade. In addition, no pictures were taken of the location of the two key pieces of circumstantial evidence. (Vol. II, RT-137 to RT-141). Evidence was burned and destroyed (Vol. II, RT-108, RT-163 through RT-166, RT-219 through RT-220), altered, commingled and defaced (Vol. II, RT-86 through RT-87, RT-89 through RT-90, RT-111 through RT-122 and RT-145). No surveillance was done at the time of the seizure. (Vol. II, RT-162, RT-166 through RT-172), nor was anyone ever seen at or near the marijuana either at the time of the seizure (Vol. I, RT-18 through RT-19, Vol. II, RT-162), or at the time of the late night surveillance (Vol. II, RT-207 through RT-214). No measurements or diagrams of the scene of the seizure or of the distance between the plots themselves and the plots and the house were done. (Vol. II, RT-181 through RT-183, RT-210 through RT-214). In fact, the agents did not even know how many plants they seized out of each plot. (Vol. II, RT-129).

In *German v. State, supra,* the Court stated: "Constructive possession may be determined by weighing those facts which tend to support the defendant's necessary control over the

substance against those facts which demonstrate a lack of dominion and control." at p. 1140, citing *Roberts v. State*, 349 So.2d at 91 (Ala.Cr.App.), *cert. denied, Ex parte Roberts*, 349 So.2d 94 (Ala. 1977). In this case, the facts supporting the Defendants lack of dominion and control substantially outweigh the facts tending to support the Defendants necessary control.

The State simply failed in all aspects to prove constructive possession. There was no proof of: 1. Actual or potential physical control; 2. Intention to exercise dominion; and 3. External manifestations of intent and control, nor was there proof beyond a reasonable doubt that the Defendants had knowledge of the marijuana. Because the evidence presented by the State could not support a rational inference by the jury that the Defendants had knowledge of the contraband, the State failed to prove beyond a reasonable doubt that the Defendants had constructive possession of the marijuana.

The Court of Criminal Appeals in its written opinion (See Appendix) failed to follow the Alabama laws of constructive possession by finding the ownership of the land was properly proven, and by failing to follow their own opinion in *Crafts, supra*. In *Crafts*, the Court of Criminal Appeals held that:

> While the ownership and exclusive possession of the property on which the marijuana is found may warrant a jury in finding that the accused was growing the illegal plant, *Puckett v. State*, 13 Md.App. 584, 284 A.2d 252 (1971), the proof in this case does not rise to that level. Here, the evidence is notable for its lack of detail and for the absence of information connecting the defendant with the growing marijuana.
>
> Although the Sheriff "assumed" that the Defendant planted the corn in the garden behind his house and yard, the State never attempted to establish who owned or possessed, or had control over the property on which the marijuana was growing.
>
> Reduced to fundamentals, all the State showed was that the Defendant's residence abutted the land on

> which marijuana was growing. . . . Here the facts and circumstances only give rise to a suspicion of guilt and are insufficient to support the conviction. *Thomas v. State*, 363 So.2d 1020 (Ala.Cr.App. 1978); *Crafts*, 439 So.2d at 1324-1325.

The Court of Criminal Appeals in *Crafts*, found that marijuana growing in between corn plants in a garden approximately 125-150 feet from the defendant's back porch was insufficient to prove that he constructively possessed the marijuana. Surely the facts in the instant case do not prove constructive possession of marijuana, and the Court of Criminal Appeals was wrong in affirming the trial court and the Alabama Supreme Court erred in failing to grant the Appellant's Petition for Writ of Certiorari. The Court of Criminal Appeals in its opinion at Page 5 (See Appendix) also used the wrong standard in finding that the State properly proved ownership of the land. The Court of Criminal Appeals stated: "At trial, both Defendants testified and admitted ownership of the property involved." However, it should be strongly noted that at the time the motion for judgment of acquittal was made at the end of the State's case, neither Defendant had yet taken the stand. The Court of Criminal Appeals, therefore, erred in using that factor to find that it proved ownership. The Petitioners were denied equal protection of the laws in that aspect, as well as, the aspect of constructive possession. The Petitioners were denied the equal protection of the laws by the Court of Criminal Appeals' failure to follow their own laws, and by them being singled out by the State as persons to be treated as such without the State of Alabama changing its laws. If the State of Alabama had wanted to make it easier to prove constructive possession, they should have so changed th laws, instead of misapplying them to the Petitioners. The Supreme Court in the *State of Louisiana v. Resweber*, 67 S.Ct. 374 at 377 stated: "So long as the law applies to all alike, the requirements of equal protection are met." It is obvious in this case that the Alabama Supreme Court and the Alabama Court of Criminal Appeals did not apply the laws of Alabama to the Petitioners, and that they were, therefore, denied the equal

protection of the laws. For these reasons, the Petitioners respectfully submit that this Court should grant their Writ.

CONCLUSION

For these reasons, both separately and severally, and to prevent a miscarriage of justice, the Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court.

Respectfully submitted,

DAVID S. LUKER
Luker and Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

OF COUNSEL:

TAMERA K. ERSKINE
Luker & Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

APPENDIX

1908, 211 U.S. 78, 90, 91, 29 S.Ct. 14, 16, 53 L.Ed. 97, the Court said: "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." *Shelley, supra*, went on to state: "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of State power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Shelley* at 845. The Alabama Supreme Court and the Alabama Court of Criminal Appeals have judicially and authoritatively construed and enforced the laws of the State of Alabama with respect to constructive possession. The essential elements necessary for the proof of possession of controlled substances in Alabama are:

1. Actual or potential physical control;
2. Intention to exercise dominion;
3. External manifestations of intent and control.

Cook v. State, 341 So.2d 183 (Ala.Cr.App. 1977); *DeGruy v. State*, 56 Ala.App. 521, 323 So.2d 406, *cert. denied*, 295 Ala. 399, 323 So.2d 411 (1975); *German v. State*, 429 So.2d 1138 (Ala.Cr.App. 1983). When constructive possession is relied on, a fourth element, that of knowledge of the presence of the controlled substances, must be proven beyond a reasonable doubt. *Campbell v. State*, 439 So.2d 718 (Ala.Cr.App.), *rev'd on other grounds*, 439 So.2d 723 (Ala. 1983); *Yarbrough v. State*, 405 So.2d 721 (Ala.Cr.App.), *cert. denied*, 405 So.2d 725 (Ala. 1981). The Alabama Supreme Court, by denying the Appellants' Petition for Writ of Certiorari, and the Alabama Court of Criminal Appeals, in issuing an opinion in conflict with the above construction and progeny of Alabama state law, denied the Petitioners the equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

A. Petitioners Were Denied Equal Protection Of The Law Due To The State Of Alabama's Failure To Follow Their Own Laws On Constructive Possession Of Controlled Substances.

1. *Facts*

On August 24, 1987, while passing over land in Autauga County, agents with the Alabama Bureau of Investigation observed what to them appeared to be marijuana. (Vol. I, RT-11). As a result of their observation, marijuana was seized on August 24, 1987, and the owners of the land, Donald B. and Camilia S. Lander were arrested on October 20, 1987. During the trial of this case, ABI pilot Roy Sumja, testified that he did not apprehend or see anyone in the field. (Vol. I, RT-18 through RT-19). ABI Agent Charles West testified that he did not see either Defendant during his investigation of the field of marijuana either at home or in the woods. (Vol. I, RT-64, Vol. II, RT-162). He further testified that he found a paper bag inside a drying shed in the woods, and that the bag had the letters "CAM" on it. (Vol. II, RT-86). He also testified that he found a yellow jacket that was dirty and in a wet condition in the woods. The jacket had the name "Don L." written on the back. (Vol. II, RT-97). He testified that there were trails between the different plots of marijuana and what appeared to be a trail in the direction of the house. (Vol. I, RT-68). He stated that he had no photographs, statements, fingerprints or other evidence that would link the Defendants to the marijuana. (Vol. II, RT-83 through RT-84, RT-123 through RT-124, RT-228, RT-137 through RT-234). After the State rested, the Defendants made a Motion for Judgment of Acquittal in that the State had failed to prove a prima facie case of constructive possession. The trial court overruled the Defendants' Motion observing: "The State's case is hanging by a very, very thin thread. But I find that there is a thread that enables them to overcome a Motion for Judgment of Acquittal." (Vol. II, RT-247). Because the trial court and the appellate court failed to apply the Alabama laws of constructive possession to the Petitioners' case, the Petitioners were

denied the Equal Protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

2. *Deprivation Of Equal Protection Of The Law By The Trial Court's Denying The Defendants' Motion For Judgment Of Acquittal And The Appellate Court's Affirmance Of The Trial Court.*

The State of Alabama failed to prove a prima facie case of constructive possession against the Defendants. There was no proof of ownership, no proof of exclusive possession, no fingerprints, or surveillance at the time of the seizure, nor was anyone ever seen at or near the marijuana plants. Before a person can be convicted of trafficking in cannabis, the State must prove beyond a reasonable doubt that he was in actual or constructive possession of the substance. In this case, there was no actual possession, so the State must have proved constructive possession. The legal definition of "constructive possession" is: "a phrase used in the law to characterize an act, not amounting to an actual appropriation of property, but which shows an intention to convert it to one's own use." In Alabama, constructive possession arises only where the illegal substance is found on the *premises of or controlled by the accused*. (emphasis added). *Campbell, supra; Williams v. State*,340 So.2d 1144 (Ala.Cr.App. 1976), *cert. denied*, 340 So.2d 1149 (Ala. 1977). In the case at bar, the State failed to prove ownership of the property. Ownership and possession of land must be proved by evidence as other facts are proved, and neither can be proved by general notoriety, nor by reputation. The State attempted to prove ownership through probate records of a copy of a quit claim issued to the Defendants. (Vol. I, RT-46 to RT-51). Through testimony of Ms. Betty Ward, a probate clerk, a certified *copy of a copy* of a quit claim deed was introduced (Vol. I, RT-48) over the objection of the Defendants. (Vol. I, RT-49). The objection was based on no proper predicate being laid and the Best Evidence Rule, and should have been sustained. As *Hill v. State*, 394 So.2d 106 (Ala.Cr.App. 1981), notes, "parole evidence is inadmissible to show title for ownership of real property, when such ownership is based on title deeds,

without first having laid a predicate for its introduction." *Hill, supra,* citing *Withers v. State,* 120 Ala. 394, 25 So. 568 (1898). The Court of Criminal Appeals in its written opinion found that in the present case, ownership of the property was proven. On Page 5 of its written opinion, (See Appendix) the Court stated as follows: "Here a copy of a quit claim deed was properly admitted into evidence, *Lukes v. Alabama Power Company,* 57 Ala. 590, 593, 60 So.2d 349 (1952); Ala.Code 1975, Sec. 35-4-27." It is clear from the testimony, however, that a copy of a quit claim deed was not introduced, but a *copy of a copy* of the quit claim deed was introduced. (Vol. I, RT-48). McElroy's *Alabama Evidence* Section 226.02 states as follows:

> If the party's claim of ownership of land is disputed by an adverse claimant thereto, oral testimony that the party owns the land, or as to the contents of deeds and instruments of conveyance to him, is not admissible without production, or showing an excuse for nonproduction, *of the original document or a duly authenticated copy* of the probate judge's record thereof if such copy is obtainable. (emphasis added)

In this case, no proper predicate had been laid, nor does a *copy of a copy* meet the standards of McElroy's. The Court of Criminal Appeals said, "Because the claim of ownership was not disputed, oral testimony was admissible to prove that fact." (page 5). The claim of ownership, however, was *highly* disputed as can be seen from the transcript, and the Landers' argument in favor of their Motion for Judgment of Acquittal. (Vol. II, RT-236 to RT-247). The Court of Criminal Appeals also said that "At trial, both Defendants testified and admitted ownership of the property involved." (page 5). However, only evidence that has been presented at the time that the Motion for Judgment of Acquittal is made should be taken into consideration in granting or overruling the motion. At the time the Motion for Judgment of Acquittal was made, the Landers had not testified to anything or admitted ownership of the property.

Even had the State proved ownership, they still failed to show a prima facie case of constructive possession. There was

no proof of exclusive possession by the Defendants, no fingerprints (Vol. II, RT-123 to RT-124, RT-149 to RT-162, RT-228 to RT-238), no surveillance at the time of the discovery, (Vol. II, RT-162, RT-166 through RT-172), and no one was ever seen at or near the marijuana (Vol. I, RT-18 to RT-19, Vol. II, RT-167 to RT-172, RT-207 to RT-214). There was insufficient evidence to meet the standards for constructive possession. In 1977, the Alabama Court of Criminal Appeals in *Cook v. State*, 341 So.2d 183 (Ala.Cr.App. 1977), citing *DeGruy v. State*, 56 Ala.App. 521, 323 So.2d 406, *cert. denied*, 295 Ala. 399, 323 So.2d 411 (1975), set forth the three essential elements necessary for the proof of possession of controlled substances. The elements are:

1. actual or potential physical control;
2. intention to exercise dominion; and
3. external manifestations of intent and control.

See also, *Franklin v. State*, 437 So.2d 609 (Ala.Cr.App. 1983); *German v. State*, 429 So.2d 1138 (Ala.Cr.App. 1983); *Scrafford v. State*, 414 So.2d 179 (Ala.Cr.App. 1981); *Collins v. State*, 391 So.2d 1078 (Ala.Cr.App. 1979); *McCord v. State*, 373 So.2d 1241 (Ala.Cr.App. 1979); *Williams v. State*, 340 So.2d 1144 (Ala.Cr.App.), *cert. denied*, 340 So.2d 1149 (1977); *Lee v. State*, 350 So.2d 743 (Ala.Cr.App. 1977). When constructive possession is relied on, the prosecution must meet a heavy burden; they must prove beyond a reasonable doubt that the accused had knowledge of the presence of the controlled substances. *Campbell, supra; Yarbrough v. State*, 405 So.2d 721 (Ala.Cr.App.), *cert. denied*, 405 So.2d 725 (Ala. 1981); *Grubbs v. State*, 462 So.2d 995 (Ala.Cr.App. 1984); *White v. State*, 479 So.2d 1368 (Ala.Cr.App. 1985). Proof of constructive possession alone will not justify a conviction. *Cook, supra; Coker v. State*, 25 Ala.App. 191, 143 So. 206 (1932). "The fundamental purpose of the knowledge requirement is founded on the legal theory that a person is cloaked with a presumption of innocence until proven guilty, and, consequently, the State, to obtain a conviction, must show that the evidence excludes all rational conclusions except that of the Defendant's guilt." *Temple v. State*, 366 So.2d 740 (Ala.Cr.App. 1978).

Knowlege can be inferred from the accused's exclusive possession, ownership, and control. *Temple, supra.* There was testimony that the Defendants had had trespassers on their property from time to time and that some things had come up missing from the farrowing shed. (Vol. II, RT-277 to RT-278 and RT-287 to RT-288). That shows that the Defendants did not have exclusive possession, ownership, and control of the premises. The State did not attempt to prove otherwise. *Temple, supra,* goes on to state that when the accused does not have exclusive possession of the premises where a controlled substance is found, some other corroborating circumstances must exist before the accused can be convicted of illegal possession. "Where a person is in possession, but not exclusive possession of the premises, it may not be inferred that he knew of the presence of any controlled substance found there unless there are other circumstances tending to buttress this inference." *Korreckt v. State,* 507 So.2d 558 (Ala.Cr.App. 1986); *Temple, surpa.* Some evidence that connects the accused with the contraband is required. Guilty knowledge can be proved by evidence of acts, or conduct of accused, from which it may be fairly inferred that he knew of the existence of the contraband at the place where it was found. *Donahoo v. State,* 505 So.2d 1067 (Ala.Cr.App. 1986). The only evidence that even remotely connects the Defendants in this case to the marijuana is a dispute over some trails in the densely wooded area where the plots were found. (Vol. II, RT-253 to RT-268). The only attempt the State made to show evidence of trails was through the testimony of ABI Agent Charles West and ex-agent, Stephen Lindsay. The trails they testified to were in an admittedly rural, marshy, densley-wooded area, where a machete was necessary to cut through the growth. (Vol. I, RT-31 to RT-32, RT-68, Vol. II, RT-102 to RT-105, RT-156 to RT-159, RT-197, RT-204). There were also many animals in the woods. (Vol. II, RT-156 to RT-159). There were not, however, any pictures, notes, diagrams or contemporaneous records to show the location or existence of the "trails". (Vol. II, RT-83 to RT-85, RT-159 to RT-161). This testimony was insufficient to show constructive possession or knowledge.

There was a raincoat and a paper bag that could have belonged to the Defendants found near the scene of the seizure, both of which were like numerous similar items used in and around the Defendants' home and farrowing shed, and were accessible to outsiders. (Vol. II, RT-274 to RT-276, RT-286 to RT-287, RT-297 to RT-298). The State attempted to show knowledge through these two items. Once again, however, there was a notable lack of detail and accuracy surrounding the items. Although numerous pictures were taken at the scene of the seizure and introduced as evidence, no pictures, notes, drawings or contemporaneous records were made regarding the two key pieces of evidence which could have linked the Defendants to the marijuana. (Vol. II, RT-83 to RT-84, RT-113 to RT-118, RT-121, RT-128 to RT-130, RT-138 to RT-141, RT-143 to RT-156, RT-160 to RT-161). In fact, the ABI agents defaced, altered and commingled the paper bags and wrote prejudicial remarks on them. (Vol. II, RT-87, RT-89 to RT-90). Despite the numerous objections of Defendants' counsel, these items were allowed into evidence. (Vol. II, RT-84, RT-87, RT-90, RT-112, RT-121).

The State failed in every respect to prove a prima facie case of constructive possession. The case at bar is similar to *Woolridge v. State*, 489 So.2d 703 (Ala.Cr.App. 1986); and *Crafts v. State*, 439 So.2d 1323 (Ala.Cr.App. 1983). In *Woolridge, supra*, several trails led from the defendant's trailer to woods where marijuana was discovered growing. Seeds were found in an oil can near the edge of the field about 75 yards from the trailer. There were also some scales and pills found inside the trailer. No one was ever found at the trailer or near the plot. The Court of Criminal Appeals held that there was insufficient evidence to establish that the defendant was in constructive possession of the contraband. The instant case does not even rise to the level of *Woolridge, supra*. The "trails" are disputed and there was no clear evidence that they existed. The marijuana was much farther away from the house (Vol I. RT-67 and Vol. II, RT-258), two hundred yards as compared to seventy-five, and in a densely-wooded area, and the only evidence even remotely linking is the raincoat and paper bag.

In *Crafts, supra,* the Court of Criminal Appeals again held that evidence was insufficient to convict the defendant. The local sheriff had been informed that the defendant was dealing in marijuana. A marijuana field was discovered in an aerial survey behind a barn, approximately 125-150 feet from the defendant's back porch. The defendant was not at home at the time of the seizure and was never seen at home or near the marijuana. The marijuana was growing in between corn plants in the garden, and several plants were drying at the edge of the woods, twenty to fifty feet behind the garden. The Court said that "the evidence is notable for its lack of detail and for the absence of information connecting the defendant with the growing marijuana." *Crafts, supra,* at p. 1324. "Reduced to fundamentals, all the State showed was that the defendant's residence abutted land on which marijuana was growing." *Crafts, supra,* at p. 1325.

> Here, there was no showing that the marijuana plants were growing on the defendant's exclusively owned and occupied residential lot . . . There was no showing that the defendant owned and was in exclusive possession of the property on which the marijuana was growing . . . *At best, the testimony in this case merely raises a suspicion that the marijuana belonged to the defendant . . . No rule is more fundamental or better settled than that convictions cannot be predicated upon surmises, speculation, and suspicion to establish the accused's criminal agency in the offense charged . . .* Here the fact that the marijuana plants were in close proximity to the defendant's residence and the Sheriff's testimony that he had been told that the defendant had been dealing in marijuana *merely showed a possibility that this defendant may have committed the offense. "However, the possibility that a thing may occur is not alone evidence, even circumstantially, that the thing did occur."* . . . Here, the facts and circumstances only give rise to a suspicion of guilt and are insufficient to support the conviction. *Crafts, supra,* at p. 1325 (emphasis added).

Finally, the Court held that "although the evidence may have been sufficient to show potential control, there was no

showing of the defendant's intention to exercise dominion and external manifestation of intent and control." *Crafts, supra,* at p. 1325. In *Crafts,* there was a foot or two between the garden and the area of the yard, and there was also evidence that the Defendant had been dealing in marijuana. In the instant case, there are no allegations of the Landers dealing in marijuana, nor is the proximity between the Lander's usable portion of the land and the marijuana plants nearly as close as "a foot or two" as in *Crafts.* In addition, no one was at home at the time of the seizure. (Vol. I, RT-64). The Defendants' convictions were based on speculation, suspicion and surmise, which as noted above, is insufficient to support a conviction. Other than the raincoat and the paper bag, there is no evidence to connect the Defendants with the marijuana. Both of these items are innocent and do not tend to support guilt. Raincoats and paper bags have no particular connection to cultivating marijuana, and are items used by people everyday in their ordinary course of business. They are not incriminating items special to the marijuana trade. In addition, no pictures were taken of the location of the two key pieces of circumstantial evidence. (Vol. II, RT-137 to RT-141). Evidence was burned and destroyed (Vol. II, RT-108, RT-163 through RT-166, RT-219 through RT-220), altered, commingled and defaced (Vol. II, RT-86 through RT-87, RT-89 through RT-90, RT-111 through RT-122 and RT-145). No surveillance was done at the time of the seizure. (Vol. II, RT-162, RT-166 through RT-172), nor was anyone ever seen at or near the marijuana either at the time of the seizure (Vol. I, RT-18 through RT-19, Vol. II, RT-162), or at the time of the late night surveillance (Vol. II, RT-207 through RT-214). No measurements or diagrams of the scene of the seizure or of the distance between the plots themselves and the plots and the house were done. (Vol. II, RT-181 through RT-183, RT-210 through RT-214). In fact, the agents did not even know how many plants they seized out of each plot. (Vol. II, RT-129).

In *German v. State, supra,* the Court stated: "Constructive possession may be determined by weighing those facts which tend to support the defendant's necessary control over the

substance against those facts which demonstrate a lack of dominion and control." at p. 1140, citing *Roberts v. State,* 349 So.2d at 91 (Ala.Cr.App.), *cert. denied, Ex parte Roberts,* 349 So.2d 94 (Ala. 1977). In this case, the facts supporting the Defendants lack of dominion and control substantially outweigh the facts tending to support the Defendants necessary control.

The State simply failed in all aspects to prove constructive possession. There was no proof of: 1. Actual or potential physical control; 2. Intention to exercise dominion; and 3. External manifestations of intent and control, nor was there proof beyond a reasonable doubt that the Defendants had knowledge of the marijuana. Because the evidence presented by the State could not support a rational inference by the jury that the Defendants had knowledge of the contraband, the State failed to prove beyond a reasonable doubt that the Defendants had constructive possession of the marijuana.

The Court of Criminal Appeals in its written opinion (See Appendix) failed to follow the Alabama laws of constructive possession by finding the ownership of the land was properly proven, and by failing to follow their own opinion in *Crafts, supra.* In *Crafts,* the Court of Criminal Appeals held that:

> While the ownership and exclusive possession of the property on which the marijuana is found may warrant a jury in finding that the accused was growing the illegal plant, *Puckett v. State,* 13 Md.App. 584, 284 A.2d 252 (1971), the proof in this case does not rise to that level. Here, the evidence is notable for its lack of detail and for the absence of information connecting the defendant with the growing marijuana.
>
> Although the Sheriff "assumed" that the Defendant planted the corn in the garden behind his house and yard, the State never attempted to establish who owned or possessed, or had control over the property on which the marijuana was growing.
>
> Reduced to fundamentals, all the State showed was that the Defendant's residence abutted the land on

> which marijuana was growing. . . . Here the facts and circumstances only give rise to a suspicion of guilt and are insufficient to support the conviction. *Thomas v. State,* 363 So.2d 1020 (Ala.Cr.App. 1978); *Crafts,* 439 So.2d at 1324-1325.

The Court of Criminal Appeals in *Crafts,* found that marijuana growing in between corn plants in a garden approximately 125-150 feet from the defendant's back porch was insufficient to prove that he constructively possessed the marijuana. Surely the facts in the instant case do not prove constructive possession of marijuana, and the Court of Criminal Appeals was wrong in affirming the trial court and the Alabama Supreme Court erred in failing to grant the Appellant's Petition for Writ of Certiorari. The Court of Criminal Appeals in its opinion at Page 5 (See Appendix) also used the wrong standard in finding that the State properly proved ownership of the land. The Court of Criminal Appeals stated: "At trial, both Defendants testified and admitted ownership of the property involved." However, it should be strongly noted that at the time the motion for judgment of acquittal was made at the end of the State's case, neither Defendant had yet taken the stand. The Court of Criminal Appeals, therefore, erred in using that factor to find that it proved ownership. The Petitioners were denied equal protection of the laws in that aspect, as well as, the aspect of constructive possession. The Petitioners were denied the equal protection of the laws by the Court of Criminal Appeals' failure to follow their own laws, and by them being singled out by the State as persons to be treated as such without the State of Alabama changing its laws. If the State of Alabama had wanted to make it easier to prove constructive possession, they should have so changed th laws, instead of misapplying them to the Petitioners. The Supreme Court in the *State of Louisiana v. Resweber,* 67 S.Ct. 374 at 377 stated: "So long as the law applies to all alike, the requirements of equal protection are met." It is obvious in this case that the Alabama Supreme Court and the Alabama Court of Criminal Appeals did not apply the laws of Alabama to the Petitioners, and that they were, therefore, denied the equal

protection of the laws. For these reasons, the Petitioners respectfully submit that this Court should grant their Writ.

CONCLUSION

For these reasons, both separately and severally, and to prevent a miscarriage of justice, the Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court.

Respectfully submitted,

DAVID S. LUKER
Luker and Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

OF COUNSEL:

TAMERA K. ERSKINE
Luker & Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

APPENDIX

TABLE OF CONTENTS

1. DECISIONS BELOW

A. Decision of the Alabama Supreme Court, *Lander v. State*, 88-1328 (December 1, 1989), Denying the Appellants' Petition for Writ of Certiorari A-1

B. Decision of the Alabama Court of Criminal Appeals, *Lander v. State*, 3 Div. 983, (May 26, 1989), Affirming With Opinion the Lower Court A-12

C. Decision of the Alabama Court of Criminal Appeals, *Lander v. State*, 3 Div. 983, (June 30, 1989), Overruling Application for Rehearing A-19

2. FEDERAL QUESTIONS RAISED BELOW

A. Issue Concerning Denial of Equal Protection of the Law

1. Appeal Brief of the Alabama Court of Criminal Appeals, *State of Alabama v. Camilia S. Lander and Donald B. Lander*, 3 Div. 983 ..... A-20

2. Petition for Writ of Certiorari to the Alabama Supreme Court, *Ex parte Lander*, 88-1328 ..... A-2

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 1, 1989

88-1328

Ex parte Camilia S. Lander and Donald B. Lander

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Camilia Saliba Lander and Donald Boyd Lander v. State)

(CRC 3/983 (Autauga CC-88-011 and 012)

ORDER

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

ALMON, J. — Hornsby, CJ., Maddox, Adams and Steagall, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 1 day of Dec., 1989.

/s/ Robert G. Esdale

Clerk, Supreme Court
of Alabama

IN THE SUPREME COURT OF ALABAMA

S.C. No. _____

EX PARTE:
CAMILIA S. LANDER AND DONALD B. LANDER,

Petitioners,

IN RE:
CAMILIA S. LANDER AND DONALD B. LANDER,

Appellants,

vs.

THE STATE OF ALABAMA,

Appellee.

ON APPEAL FROM THE
AUTAUGA COUNTY CIRCUIT COURT
NINETEENTH JUDICIAL CIRCUIT OF ALABAMA
(CASE NO. CC 88-011 AND CC 88-012)

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE COURT OF
CRIMINAL APPEALS OF ALABAMA
(3RD Div 983)

DAVID S. LUKER
ATTORNEY FOR
PETITIONERS
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA:

Come now your Petitioners, Donald B. and Camilia S. Lander, by and through their undersigned attorney, and petitions this Honorable Court for a Writ of Certiorari to issue to the Honorable Court of Criminal Appeals of Alabama in the above styled cause pursuant to Rules 39 and 41 of the *Alabama Rules of Appellate Procedure*, and as grounds therefore, shows the following:

1. That the Petitioners were convicted of trafficking in cannabis on May 12, 1988 in Autauga County, Case No. CC 88-011 and CC 88-012. The Honorable Judge John B. Bush sentenced the Defendant, Donald B. Lander to fifteen (15) years in the penitentiary, assessed a Twenty-five Thousand Dollar ($25,000.00) fine, and ordered Fifteen Hundred Dollars ($1,500.00) be paid to the Victim's Compensation Crime Fund. Camilia S. Lander was sentenced to five (5) years in the penitentiary, Twenty-five Thousand Dollars ($25,000.00) fine, and ordered to pay Fifteen Hundred Dollars ($1,500.00) to the Victim's Compensation Crime Fund. On June 24, 1988, the Defendant's perfected an Appeal Bond and filed a Motion for a New Trial, which was denied on August 9, 1988. On January 3, 1989, the Court of Criminal Appeals of Alabama denied Defendants' oral argument request, and the Appeal was submitted. On May 26, 1989, the Alabama Court of Criminal Appeals affirmed the judgment of the Circuit Court of Autauga County, Alabama in a written opinion. An Application for Rehearing was filed on June 7, 1989, and was overruled on June 30, 1989, with no opinion.

2. A copy of the certificate of the intermediate appellate court is attached to this Petition, which shows the Court of Criminal Appeals number to be 3rd Division, 983. (See Exhibit A attached hereto).

3. Pursuant to Rules 39 and 40 of the *Alabama Rules of Appellate Procedure*, the Defendants filed an additional brief and argument in support of their Application for Rehearing.

and assigned errors to the opinion released by the Court of Criminal Appeals of Alabama on May 26, 1989, a copy of which is attached hereto. (See Exhibit B).

4. The basis of the Petition is as follows:

"A"

Pursuant to Rule 39(c)(4) of the *Alabama Rules of Appellate Procedure*, the Petitioners assert that the issues raised in Argument I of their Brief on Appeal were incorrectly decided by the intermediate Appellate Court in their opinion released on May 26, 1989, and are in direct conflict with the opinion of the Alabama Supreme Court in *Lukes v. Alabama Power Company*, 357 Ala. 590, 60 So.2d 349 (1952), *Dolvin v. State*, 391 So.2d 133 (Ala. 1980); with the decision of the Alabama Court of Criminal Appeals in *Crafts v. State*, 439 So.2d 1323 (Ala.Cr.App. 1983), *Cumbo v. State*, 368 So.2d 871 (Ala.Cr.App. 1978), *cert. denied*, 368 So.2d 877 (Ala. 1979) and *German v. State*, 429 So.2d 1138 (Ala.Cr.App. 1983); with the *Code of Alabama*, (1975), Section 35-4-27 and *McElroy's Alabama Evidence* Section 226.02.

In *Dolvin* and *Cumbo, supra*, the Court set out the rules for reviewing a conviction based on circumstantial evidence. "In reviewing a conviction based on circumstantial evidence, this court must view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude." (*Dolvin* at 672). In this case, even when the evidence is viewed in the light most favorable to the prosecution, it is insufficient to allow the submission of the Lander's guilt or innocence to go to the jury. The Court of Criminal Appeals in its opinion found the testimony of ex-Deputy Steven Lindsey to be credible, and afforded it the most weight. On pages 3 and 4 of the Court of Criminal Appeals' Opinion, more than a "legitimate inference" than can be reasonably drawn was given to ex-Deputy Lindsey's testimony. Of all of the wit-

nesses, ex-Deputy Lindsey was the least believable. He had to be cautioned by the Judge several times for drawing conclusions, characterizing his testimony, and enhancing his testimony to make it sound better. (Vol. II RT-200, RT-210, RT-202, RT-203, RT-205). On pages 3 and 4 of the Court of Criminal Appeals' Opinion, that same enhanced testimony was found to be a fact.

Ex-Deputy Lindsey's testimony regarding the existence of the trails was in conflict with ABI Agent Charles West's testimony that the trails were in a rural, marshy, densely wooded area, where a machete was necessary to cut through the growth. (Vol. I RT-31 to RT-32, RT-68, Vol. II RT-102 to RT-105, RT-156 to RT-159, RT-97, RT-204). Agent West, who was in charge of the investigation, gave testimony that conflicted with the testimony of ex-Deputy Lindsey. From the location of the garden, the alleged trails went down into a swampy area, and it is reasonable to assume that deer, turkey and other wildlife came out of the woods and made a path to the garden. Ex-Deputy Lindsey himself testified that there were many animals in the woods. (Vol. II RT-156 to RT-159).

Despite the fact that all of the agents and officers involved in the investigation had been trained in this type of investigation, they made no pictures, diagrams or contemporaneous records to show the location or existence of the alleged trails. (Vol. I RT-83 to RT-85, RT-159 to RT-161). When ex-Deputy Lindsey's testimony is looked at in conjunction with Agent West's testimony, and even when contrasted with some of his own testimony, it is clear that the Court of Criminal Appeals gave it too much weight and credibility. Looking at the State's testimony in its most favorable light, does not mean turning a blind eye to obvious discrepancies, and the lack of credibility in ex-Deputy Lindsey's testimony. The existence of the trails was highly disputed, and even if they were taken as fact, they are not enough to prove the Landers' guilt.

"B"

The Court of Criminal Appeals in its written opinion, found that there were distinguishing material differences between the evidence in *Crafts v. State, supra,* and the evidence in the present case. The main distinguishing factors that the Court of Criminal Appeals found was that in the Landers' case, ownership of the property was proved. Ownership was not, however, proven. At the most, all the State did was introduce *a copy of a copy* of a quitclaim deed over the objection of the Defendant (Vol. I RT-48 to RT-49). The Court of Criminal Appeals never addressed this issue. On page 5 of its written opinion, the Court stated as follows: "Here, a copy of the quitclaim deed was properly admitted into evidence, *Lukes v. Alabama Power Company,* 257 Ala. 590, 593, 60 So.2d 349 (1952); Ala.Code 1975, Section 35-4-27." It is clear from the testimony, however, that a copy of the quitclaim deed was not introduced, but a *copy of a copy* of a quitclaim deed was introduced. (Vol. II RT-48). Section 35-4-27 deals with the proof of the official seal.

> All deeds, powers of attorney and other instruments of conveyance, affidavits or contracts purporting to be acknowledged, proved or verified as prescribed by law, and which have been recorded or may hereafter be recorded in the office of the judge of probate of the proper county in this state, and transcripts thereof from such record shall be prima facie evidence that the seal of such officer acknowledging or attesting such instrument was his official seal and that it was affixed by him in his official capacity; and all such instruments and certified copies thereof shall have the same force and effect and shall be received in evidence in any court in this state without further proof of the due execution of such instrument or proof of the seal of any officer so certifying or attesting and that the same was affixed by him as his official seal, in his official capacity, whether he be an officer of this state or of any other state, territory or district of the United States.

This section does not deal with the problem in the Landers' trial. The seal or certification by the probate judge does not reach the issue of whether a *copy of a copy* of a deed is admissible as proof of ownership of land. *McElroy's Alabama Evidence* Section 225.02 states as follows: "If the parties claim of ownership of land is disputed by an adverse claimant thereto, oral testimony that the party owns the land, or as to the contents of deeds and instruments of conveyance to him, is not admissible with *production*, or showing an excuse for non-production, *of the original document or duly authenticated copy* of the probate judge's record thereof if such copy of obtainable." (Emphasis added). In this case, no proper predicate had been laid, nor does the *copy of a copy* meet the standards of *McElroy* or Section 35-4-27.

The Court of Criminal Appeals said, "Because the claim of ownership was not disputed, oral testimony was admissible to prove that fact." (Page 5). The claim of ownership, however, was highly disputed, as can be seen from the transcript and the Landers' argument in favor of their Motion for Judgment of Acquittal. (Vol. II RT-236 to RT-247). The Court of Criminal Appeals also said that, "At trial, both defendants testified and admitted ownership of the property involved." (Page 5). However, only evidence that has been presented at the time that the Motion for Judgment for Acquittal is made should be taken into consideration in granting or overruling the Motion. At the time the Motion for Judgment of Acquittal was made by the Landers, they had not testified to anything, or admitted ownership of the property. It is clear, therefore, that the introduction of *a copy of a copy* of a quitclaim deed is not enough to prove ownership of the land, and ownership cannot be used to distinguish the Landers' case from the facts in *Crafts, supra.* Because ownership of the land was not proved, there is no other evidence to distinguish this case from *Crafts, supra,* except for the facts that are in the Landers' favor.

In *Crafts, supra,* 521 cultivated marijuana plants were growing in a field behind the defendant's residence, and there was evidence that harvesting of the marijuana had begun. The field of marijuana was located behind the barn,

approximately 125 to 150 feet from the defendant's back porch. The marijuana was growing in between five to seven rows of corn, which were forty to fifty feet long. The Court stated, "At best, the testimony in this case merely raises a suspicion that the marijuana belonged to the defendant. No rule is more fundamental or better settled than that convictions cannot be predicated upon the surmise, speculation and suspicion to establish the accused's criminal agency in the offense charged." (at 1325). In *Crafts, supra,* the proximity of the marijuana to the residence was much closer than in the present case. In this case, marijuana was growing in a densely wooded area some 580 feet from the house, as compared to 125 to 150 feet from the house. In *Crafts, supra,* the marijuana was also growing in a cultivated garden. In both cases, the defendants were never seen at or near the marijuana, nor was anyone home at the time of the seizure. In *Crafts, supra,* there was a foot or two between the garden and the mowed area of the yard, and there was also evidence that the defendant had been dealing in marijuana. In the instant case, there are no allegations of the Landers dealing in marijuana, nor is the proximity between the Landers' usable portion of their land and the marijuana plants nearly as close as a foot or two as in *Crafts, supra.* It is clear that *Crafts, supra,* is the controlling case, and that the facts in the Landers' case are not even as strong as those in *Crafts, supra.* The Landers' conviction, therefore, should be reversed in accordance.

"C"

The Court of Criminal Appeals in their written opinion found that the State met all of the elements of constructive possession. The Court found that the circumstantial evidence presented, when taken together, supplied adequate proof of the defendants' guilt. The circumstances presented, however, fail to adequately prove constructive possession. "Constructive possession may be determined by weighing those facts which tend to support the defendant's necessary control over the substance against those facts which demonstrate a lack of dominion and control." *German v. State,* 429

So.2d 1138 (Ala.Cr.App. 1983). In this case, the facts supporting the defendants' lack of dominion and control, substantially outweigh the facts tending to support the defendants' necessary control. The factors listed on page 7 of the Court of Criminal Appeals written opinion are simply not enough to prove constructive possession. The circumstantial evidence does not exclude every reasonable hypothesis but that of the defendants' guilt. The rural, densely wooded nature of the geographical area involved does not go to show the defendants' guilt or innocence. Marijuana is rarely found to be growing in an open area. The defendants' ownership of the land was never proven. The inaccessible nature of the property was also highly disputed. Mr. Lander testified that there were at least three other means of access to the property, and that there were often trespassers on the property. (Vol. II RT-277 to RT-278, RT-287 to RT-288). The size, number and location of the marijuana fields in relation to the Defendants' residence, if anything, shows that the Defendants were not involved. The marijuana was in a swampy, densely wooded area, far away from the Defendants' residence in an area that they did not use. The size of the marijuana and the presence of various items, including the drying shed, only shows that "someone" was growing it, not necessarily that the Defendants were growing it. The presence and condition of the paths connecting the marijuana fields were highly disputed. Even if the paths are taken as a fact, their presence should not be used to convict the Defendants. If the Landers did not know that the marijuana was there, how were they expected to know that paths connecting the marijuana were there. It is an unreasonable burden to expect them to patrol over 40 acres of land and determine the origination and cause of paths. The only two things that can be taken as facts are that a jacket bearing the name "Don L.", and a paper bag with "Cam" written on it were found *somewhere*. No pictures, maps, notes or other evidence showing where these two things were found were put in evidence. Even if they were found on a path or in the drying shed respectively, that does not prove that the Landers put them there. Both of the defendants testified that

similar items could be found throughout their property. (Vol. II RT-274, RT-295 to RT-297). These bags and raincoats were kept in their unlocked and accesible storage sheds, as well as in their back yard. In short, the circumstantial evidence which was presented is hardly of any incriminating nature. Raincoats and paper bags have no particular connection to cultivating marijuana, and are used everyday in the ordinary course of business. These circumstances do not exclude every reasonable hypothesis but that of the Landers' guilt. Many explanations could be given and inferred from these circumstances. Because the State failed to prove constructive possession and the circumstantial evidence presented by them failed to prove beyond a reasonable doubt that the Defendants were guilty, the Landers' conviction is due to be reversed.

WHEREFORE, above premises considered, the Petitioners respectfully pray that the Writ of Certiorari be granted, and that this Honorable Court proceed under its rules to review the matters complained of to reverse the judgment of the Court of Criminal Appeals; that this Court exercise superintendent authority over the intermediate Appellate Court to review the law as applied to the facts pursuant to the *Alabama Rules of Appellate Procedure* and to exercise this Court's responsibility to review the erroneous treatment of the Petitioners properly raised issues improperly decided by the intermediate Appellate Court. The Petitioners pray for such other relief as to which they may be entitled.

I hereby certify that I have sent copies of this Petition and the Brief in support thereof as required by Rule 39(e) of the *Alabama Rules of Appellate Procedure* this the 14th day of July, 1989.

Respectfully submitted,

/s/ David S. Luker

DAVID S. LUKER
ATTORNEY FOR PETITIONERS
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Petition of Certiorari upon the Honorable Don Siegelman, Attorney General for the State of Alabama, via U.S. Mail this the 14th day of July, 1989.

/s/ David S. Luker

DAVID S. LUKER

RELEASED MAY 26, 1989

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1988-89

3 Div. 983

Camilia Saliba Lander
and
Donald Boyd Lander

v

State

Appeal from Autauga Circuit Court

BOWEN, JUDGE

Camilia and Donald Lander were convicted for trafficking in cannabis in violation of Alabama Code 1975, § 20-2-80(1)(a). Mr. Lander was sentenced to fifteen years' imprisonment, while Mrs. Lander received a five-year prison sentence. Each was fined $25,000 and ordered to pay $1,500 to the Victims Compensation Fund.

The only question presented on this appeal from those convictions is the legal sufficiency of the State's evidence in proving the defendants' possession of the marijuana.

The standard for appellate review of the sufficiency of the evidence in a conviction based upon circumstantial evidence is set out in *Dolvin v. State*,, 391 So.2d 133, 137-38 (Ala. 1980), and *Cumbo v. State*, 368 So.2d 871, 874 (Ala.Cr.App. 1978), cert. denied, *Ex parte Cumbo*, 368 So.2d 877 (Ala. 1979). See also *White v. State*, [Ms. 4 Div. 966, March 31, 1989], ___ So.2d ___ (Ala.Cr.App. 1989). Applying the standards and legal principles set out in those cases to the facts presented here, we conclude that the evidence was legally sufficient to allow the submission of the issue of the defendants' guilt or innocence to the jury.

Viewed in its most favorable light, the State's evidence shows that, on August 24, 1987, acting on an anonymous tip which indicated that marijuana was being grown in Perry County, State Troopers Roy Sumja and Buddy Fletcher obtained a helicopter from the Department of Public Safety in order to make an aerial surveillance of the suspected property. While en route from Montgomery to Perry County, the officers observed a large patch of marijuana in Autauga County. Upon making this observation, the troopers abandoned their flight to Perry County and informed Alabama Bureau of Investigation (ABI) Agent Charles West of their discovery. Agent West was taken up in the helicopter and shown the marijuana.

After completing their aerial surveillance of the defendants' property, Agent West and a deputy with the Autauga County Sheriff's Department entered the property to conduct a search. The officers proceeded to a residence, but found no one at home. The officers did not search the residence but proceeded on the property to the garden. The garden was located approximately 30 yards behind the residence. At the rear of the garden, the officers found two trails leading into the woods. One of these trails led to three plots of marijuana. Stephen Lindsey, the Deputy who assisted in the search of the defendants' property, testified that the path "was wore down all the way to the dirt" and "was cleared of limbs at some points." Upon following this trail, law enforcement officials discovered the first marijuana plot approximately 150 yards from the residence and about 30 yards from the garden.

The trail continued through the woods to a second patch of marijuana. Deputy Lindsey testified that while on the trail between the first and second marijuana plots he discovered a jacket with the name "Don L." sewn on it. The record further reveals that the trail progressed to a third plot of marijuana and a plastic enclosed shed. Throughout the testimony, the witnesses referred to this enclosure as a "drying shed." Drying marijuana and other evidence of marijuana cultivation were seized from this shed. Also found inside the "shed" were a chain, heaters, butane tanks, lanterns, "manicuring

racks," and "plastic bags" containing marijuana plant material. A paper bag with Mrs. Landers' name ("Cam") written on it was found in the shed.

After observing the "drying shed" and its contents, Deputy Lindsey followed a trail which was "basically on a creek" to the fourth and final marijuana plot.

Upon their search of the 60 acres, the officers seized numerous marijuana plants and substantial evidence of marijuana cultivation. The plants were "rather large" and were 12 to 16 feet tall. No fingerprints were found on any of the items seized.

The State's evidence also established that the property upon which the marijuana was growing was in the exclusive possession and control of the defendants. The property on which the marijuana fields were found was located in a rural and densely wooded area. The State's evidence indicated that the marijuana field "could be accessed only by a complex of trails" which terminated at either end of the defendants' garden. Mr. Lander disputed this evidence, testifying that there were at least three other means of access to the property. There was no residence near these fields except that belonging to the defendants. Records in the county tax assessor's office indicated that certain property in Autauga County (with the address Route 4, Box 442B, Prattville) was assessed to the defendants. Records in the probate office indicate that a quitclaim deed was issued to the defendants as joint tenants in 1983 and there was no record that ownership of the property had transferred.

Fred David McGee testified that he resided in the "Vida community, Route 4, Box 442, Prattville," and he identified the area on the Autauga County map. He stated that there were two mailboxes located next to his and that one was labeled "Joy, Don and Cam." He identified the defendants, "Cam and Don," as being his neighbors. Defense counsel stipulated that the defendants were his neighbors. Mr. McGee testified that he had occasionally seen the defendants and their vehicles on the property.

The defendants contend that their motion for a judgment of acquittal should have been granted because the State's

evidence was insufficient to prove a prima facie case of constructive possession. In support of this contention, they cite the case of *Crafts v. State,* 439 So.2d 1323 (Ala.Cr.App. 1983). We agree with the defendants' counsel that there are similarities between the instant case and *Crafts.* However, there are distinguishing material differences between the evidence in *Crafts* and the evidence in the present case. In *Crafts,* we determined that:

> " 'While the ownership and exclusive possession of the property on which the marijuana is found may warrant a jury in finding that the accused was growing the illegal plant, *Puckett v. State,* 13 Md.App. 584, 284 A.2d 252 (1971), the proof in this case does not rise to that level. Here, the evidence is notable for its lack of detail and for the absence of information connecting the defendant with the growing marijuana.
>
> " 'Although the Sheriff 'assumed' that the defendant planted the corn in the garden behind his house and yard, the State never attempted to establish who owned or possessed or had control over the property on which the marijuana was growing.
>
> " 'Reduced to fundamentals, all the State showed was that the defendant's residence abutted land on which marijuana was growing. . . .
>
> " '. . . Here the facts and circumstances only give rise to a suspicion of guilt and are insufficient to support the conviction. *Thomas v. State,* 363 So.2d 1020 (Ala.Cr.App. 1978).' " *Crafts,* 439 So.2d at 1324-25.

Here, the State presented sufficient evidence from which the jury could have reasonably concluded that the defendants owned and were in exclusive possession and control of the property on which the marijuana was growing. Here, a copy of the quitclaim deed was properly admitted into evidence, *Lukes v. Alabama Power Co.,* 257 Ala. 590, 593, 60 So.2d 349 (1952); Ala.Code 1975, § 35-4-27. At trial, both defendants testified and admitted ownership of the property involved. Because the claim of ownership was not disputed,

oral testimony was admissible to prove that fact. C. Gamble, *McElroy's Alabama Evidence* § 226.02 (3d ed. 1977).

We believe that the evidence produced by the State, when viewed in a light most favorable to the prosecution, was sufficient to allow the jury to reasonably conclude that the evidence excluded every reasonable hypothesis except that of guilt. We agree with the trial judge in his observation: "The state's case is hanging by a very, very thin thread. But I find that there is a thread that enables them to overcome a motion for judgment of acquittal."

"To establish a prima facie case of possession of narcotics, there must be actual or constructive possession and guilty knowledge." *Hall v. State,* 455 So.2d 94 (Ala.Cr.App. 1984). "Constructive possession arises only where the illegal substance is found on premises owned or controlled by the accused. *Williams v. State,* 340 So.2d 1144 (Ala.Cr.App. 1976), cert. denied, 340 So.2d 1149 (Ala. 1977)." *Grubbs v. State,* 462 So.2d 995, 997 (Ala.Cr.App. 1984). In the instant case, the State presented evidence showing that the defendants owned and controlled the property where the marijuana was found.

In order to establish constructive possession, the State must prove: (1) actual or potential control; (2) intention to exercise dominion; and (3) an external manifestation of intent and control. *Eady v. State,* 495 So.2d 1161, 1164 (Ala.Cr.App. 1986); *Williams v. State,* 340 So.2d 1144, 1145 (Ala.Cr.App. 1976), cert. denied, 340 So.2d 1149 (Ala. 1977). "Where constructive possession is relied on the State must also prove beyond a reasonable doubt that the accused knew of the presence of the prohibited substance." *Temple v. State,* 366 So.2d 740, 741 (Ala.Cr.App. 1978). "The use of direct proof to show constructive possession is not necessary; the elements of such possession may be proven through a sufficient showing of the surrounding facts and circumstances, *Franklin v. State,* 437 So.2d 609 (Ala.Cr.App. 1983), and such a showing was made in this case." *Coffin v. State,* 449 So.2d 1263, 1264 (Ala.Cr.App. 1984). "Knowledge of the presence of a controlled substance may be proved by circumstantial evidence, see *Reed v. State,* Ala.Cr.App., 368 So.2d

326 (1979); *Henderson v. State,* Ala.Cr.App., 347 So.2d 540, cert. quashed, Ala., 347 So.2d 543 (1977)." *Etheridge v. State,* 414 So.2d 157, 163 (Ala.Cr.App. 1982). Additionally, where illegal substances are found on a premises under the control of the defendant, an inference may arise that the defendant had knowledge and possession of such drugs. *Moore v. State,* 457 So.2d 981, 987 (Ala.Cr.App. 1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1757, 84 L.Ed.2d 820 (Ala. 1985).

The circumstances present in this case which authorize a reasonable inference of the defendants' knowledge and control of the marijuana are the rural, densely wooded, nature of the geographical area involved; the defendants' ownership of the land on which the marijuana was discovered; the relatively inaccessible nature of that property; the size, number, and location of the four marijuana fields in relation to the defendants' residence; the size of the growing marijuana; the presence of various items, including a "drying shed," used in the growing, cultivation, processing, and distribution of marijuana; the "very well used" and "real beaten" condition of the foot paths connecting the defendants' garden and the marijuana fields; and, finally, the presence and location of a jacket bearing the name "Don L." and a paper bag with "Cam" written on it. These circumstances, in combination, supplied adequate proof of the defendants' guilt.

The trails leading from the defendants' garden to the marijuana fields were described as "very well used." "Alabama has never been committed to the 'beaten path" doctrine (in location not exclusively under defendant's control), as a matter of circumstance, which alone can convict without proof of some act of guilty knowledge." *Parker v. State,* 40 Ala.App. 244, 247, 112 So.2d 493, cert. denied, 269 Ala. 699, 112 So.2d 496 (1959); *Terry v. State,* 44 Ala.App. 356, 359, 208 So.2d 804 (1968). See *Mitchell v. State,* 18 Ala.App. 119, 120, 89 So. 98 (1921) ("The mere fact that a small distilling outfit is set up in a wood 150 to 200 yards from defendant's house, on land not in possession or under the control of defendant, and that one of the paths leading from the place went in the direction of the defendant's house, is a circum-

stance, and to be considered when other circumstances connect the defendant with the still, but standing alone is not sufficient to convict."). Although we recognize that the defendants' knowledge of the presence of the marijuana cannot be inferred solely from the evidence of "beaten paths," we conclude that such evidence is a proper consideration, when coupled with other facts and circumstances, in determining the existence of that knowledge.

Here, as in *Boles v. State,* 19 Ala.App. 184, 185, 95 So. 909 (1923), the motion for judgment of acquittal was properly overruled "for the reason there were many incriminating facts and circumstances."

> "We are of the opinion that, from all this testimony, the reasonable and necessary inference was afforded that the defendant owned or possessed the contraband articles found upon his premises, and we do not think that the jury did violence to their duty or to their conscience in so finding. And we think that the facts not only warranted the [judge], but required him, to submit the question of the guilt or innocence of the accused to the jury, under proper instructions, which in the instant case, the record shows, was by the court so submitted.
>
> "As stated by this court in Walker v. State, [19 Ala.App. 20], 95 South. 205:
>
> " 'A charge of this character can be sustained upon what is known as circumstantial evidence, just as can any other criminal charge, and it becomes a question for the determination of the jury.'
>
> "To hold otherwise would result in laying down the rule that, unless the testimony disclosed that the accused was caught in the actual commission of the offense, there could be no conviction. A rule of that character would open an avenue of absolute safety to the lawbreaker, and render his conviction impossible by his merely absenting himself from his own still and its operation." *Boles,* 19 Ala.App. at 186.

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

June 30, 1989

3 Div. 983

AUTAUGA Circuit Court
CC#s CC 88-011 & 012

CAMILIA SALIBA LANDER AND
DONALD BOYD LANDER
Appellants

vs.

State of Alabama
Appellee

Dear Sir:

You are hereby notified that on June 30, 1989, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama.

xxxxx Application for rehearing **overruled. No opinion.** Judgment not final, see Rules 39 and 41. A.R.A.P.

/s/ Mollie Jordan

CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

A-20

IN THE
COURT OF CRIMINAL APPEALS OF ALABAMA
3 DIV. 983

STATE OF ALABAMA,

Plaintiff/Appellee,

vs.

CAMILIA S. LANDER AND DONALD B. LANDER

Defendant/Appellant

Case No. CC 88-011 / CC 88-012
Appealed from Autauga County Circuit Court
Nineteenth Judicial Circuit of Alabama

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

DAVID S. LUKER
ATTORNEY FOR APPELLANT
2205 Morris Avenue
Birmingham, AL 35203
Phone: (205) 251-6666

STATEMENT OF THE CASE

The Defendants, Donald B. Lander and Camilia S. Lander, were arrested on October 20, 1987, and charged with trafficking marijuana. On August 24 of 1987, officers of the Alabama Bureau of Investigation received a quantity of marijuana as a result of aerial observation from property that was owned by the Defendants. On February 12, 1988, the Autauga County Grand Jury returned indictments against Camilia S. Lander and Donald B. Lander for trafficking in marijuana. They were arraigned on March 8, 1988, and the case was set for trial on May 10, 1988. The cases were consolidated for purposes of the trial. Numerous pre-trial motions were filed by both Defendants, and the case was tried before a jury in Autauga County on May 10, 11, and 12. On May 12, 1988, the Autauga County jury returned a verdict of guilty against both Donald B. Lander and Camilia S. Lander. The case was continued for pre-sentencing investigation to the 24th of June 1988, at which time the Honorable Judge John B. Bush sentenced Defendant Donald B. Lander to fifteen (15) years in the penitentiary, assessed a $25,000 fine, and order $1500 be paid to the Victim's Compensation Crime Fund. The Honorable Judge Bush sentenced Camilia S. Lander to five (5) years in the penitentiary, $25,000 fine, and ordered her to pay $1500 to the Victim's Compensation Crime Fund. On the 24th of June, 1988, the Defendants perfected an appeal bond in the above styled case. Defendants then filed a Motion for a New Trial on the 24th of June, 1988. On August 9, 1988, the Honorable Judge Bush denied the Defendants motion for a new trial.

ISSUES PRESENTED FOR REVIEW

1. DID THE TRIAL COURT ERR BY OVERRULING THE DEFENDANTS MOTION FOR A JUDGMENT OF ACQUITTAL IN THAT THE STATE FAILED TO PROVE A PRIMA FACIE CASE?

STATEMENT OF THE FACTS

On August 24, 1987, at approximately 2:00 p.m., agents with the Alabama Bureau of Investigation were involved in a routine flight from Montgomery to Perry County. While passing over land in Autauga County, they observed what to them appeared to be marijuana plants. (R-11). As a result of their observation, marijuana was seized on August 24th, and a search was executed on August 25th on the residence of Donald B. and Camilia S. Lander. (011 to 013). The fruits of this search were later suppressed by the trial court. (086 to 087). As a result of the observation and seizure from the field, Donald B. Lander and Camilia S. Lander were arrested on October 20, 1987. The Defendants were indicted on February 12, 1988 by the Autauga County Grand Jury (033 to 036). The case was set for trial on May 10, 1988, tried on May 10, 11, and 12, and on May 12, 1988, the jury returned a guilty verdict against both Defendants. (190-191). During the trial of this case, testimony was elicited from ABI pilot, Roy Sumja, who said he observed marijuana on the ground from his position in the helicopter. (R-11). Agent Sumja stated that he did not apprehend or see anyone in the field. (R-18 to R-19). Alabama Bureau of Investigation Agent Charles West testified, and during his testimony he stated that he did not see either Defendant during his investigation of the field of marijuana either at home or in the woods. (R-64, R-162). However, he did testify that he had found a paper bag inside a drying shed in the woods. The bag had the name of the defendant Camilia S. Lander on it. (R-86). He also testified that while he was gathering the marijuana plants, he observed a yellow jacket that was dirty and on the ground in a wet condition that had the name "Don L" on the back. (R-79). He testified that there were trails between the different plots of marijuana, and what appeared to be a trail in the direction of the house. (R-68). Agent West testified that he had no photographs, statements, fingerprints, or other evidence that would link the Defendants to the marijuana. (R-83 to R-84, R-123 to R-124, R-228, R-137-R-234).

The Defendant Donald B. Lander took the stand and testified that he had no knowledge of the marijuana, and that

it was not his. (R-272). Defendant Donald B. Lander also testified that he had in the past obtained yellow rain slickers similar to the one that Agent West found, and that he had kept them in his yard, and in his storage shed, and that the one found in the field could have possibly been his. (R-274).

Defendant Camilia S. Lander took the stand and testified that she had no knowledge of the marijuana field, that it did not belong to her, (R-298), and that she stored bags from WalMart and other such paper bags in her house and in her shed, and that the bag found in the drying shed could possibly have been hers. (R-295 to R-297). Both Defendants denied knowledge of the marijuana or any involvement with it. (R-272 and R-298). At the close of the State's case, the Defendants moved for a Motion for Judgment of Acquittal on the grounds that the State failed to prove a prima facie case in that they failed to prove the elements of constructive possession. (R-236 to R-247). The Defendant was sentenced on June 24, 1988 and gave Notice of Appeal, and filed a motion for a new trial. (R-198 to R-201).

ARGUMENT

ISSUE ONE

DID THE TRIAL COURT ERR BY OVERRULING THE DEFENDANTS MOTION FOR A JUDGMENT OF ACQUITTAL IN THAT THE STATE FAILED TO PROVE A PRIMA FACIE CASE?

The State failed to prove a prima facie case against the Defendants. There was no proof of ownership, no proof of exclusive possession, no fingerprints, no surveillance at the time of the seizure, nor was anyone ever seen at or near the marijuana plants. The State did not prove the elements of constructive possession, therefore, the Defendants were wrongfully convicted.

Before a person can be convicted of trafficking in cannabis, the State must prove beyond a reasonable doubt that he was in actual or constructive possession of the substance. In this case, there was no actual possession, so the State must

have proved constructive possession. The legal definition of "constructive possession" is "a phrase used in the law to characterize an act not amounting to an actual appropriation of property, but which shows an intention to convert it to one's own use." In addition, constructive possession arises only where the illegal substance is found on the premises owned or controlled by the accused. *Campbell v. State,* 439 So.2d 719 (Ala.Cr.App.), rev'd. on other grounds, 439 So.2d 723 (Ala. 1983); *Williams v. State,* 340 So.2d 1144 (Ala.Cr.App. 1976), cert. denied, 340 So.2d 1149 (Ala. 1977). In the case at bar, the State failed to prove ownership of the property.

Ownership and possession of land msut be proved by evidence as other facts are proved and neither can be proved by general notoriety nor by reputation. *M.C. Dixon Lumber Co., Inc. v. Mathison,* 289 Ala. 229, 266 So.2d 841 (1972). *Brown v. State,* 7 So.2d 557, 242 Ala. 630 (1942); Gamble, *McElroy's Alabama Evidence,* Section 257.02 (3rd ed. 1977). In this case, the State tried to prove ownership through the testimony of a neighbor of the Defendants, Mr. Fred McGee (R-185 to R-192). Based on *Dixon, supra,* Mr. McGee's testimony did not prove ownership.

The State also tried to prove ownership by introducing the tax assessor's records (R-33 to R-46 and R-51 to R-55). Those too, do not prove ownership, and are inadmissible for such purposes. *McElroy's Alabama Evidence, supra,* states that "a tax assessor's records is not admissible as tending to show ownership of the property in the person who listed it for taxation." *McElroy's, supra,* Section 267.04; *Wright v. Merriwether,* 51 Ala. 183 (1874). Also see R-96 to R-98.

The State attempted to prove ownership through probate records of a copy of a quit claim deed issued to the Defendants (R-46 to R-51). Through the testimony of Ms. Betty Ward, a probate clerk, a certified copy of a copy of a quit claim deed was introduced (R-48) over the objection of the Defendants. (R-49). The objection was based on no proper predicate being laid and the Best Evidence Rule, and should have been sustained. As *Hill v. State,* 394 So.2d 106 (Ala.Cr.App. 1981), notes "parol evidence is inadmissible to

show title for ownership of real property, when such ownership is based on title deeds, without first having laid a predicate for its introduction." *Hill, supra,* citing *Withers v. State,* 120 Ala. 394, 25 So. 568 (1898). Due to the State's failure to prove ownership of the land on which the marijuana was growing, the conviction for trafficking should be reversed.

Even had the State proved ownership, they still failed to show a prima facie case of constructive possession. There was no proof of exclusive possession by the Defendants, no fingerprints (R-123 to R-124, R-149 to R-162, R-228 to R-234), no surveillance at the time of the discovery, (R-162, R-166-172), and no one was ever seen at or near the marijuana (R-18 to R-19, R-167 to R-172, R-207 to R-214). There was insufficient evidence to meet the standards for constructive possession. In 1977, the Alabama Court of Criminal Appeals in *Cook v. State,* 341 So.2d 183 (Ala.Cr.App. 1977), citing *DeGruy v. State,* 56 Ala.App. 521, 323 So.2d 406, cert. denied, 295 Ala. 399, 323 So.2d 411 (1975), set forth the three essential elements necessary for the proof of possession of controlled substances. The elements are:

1. actual or potential physical control;
2. intention to exercise dominion; and
3. external manifestations of intent and control.

See also, *Franklin v. State,* 437 So.2d 609 (Ala.Cr.App. 1983); *German v. State,* 429 So.2d 1138 (Ala.Cr.App. 1983); *Scrafford v. State,* 414 So.2d 179 (Ala.Cr.App. 1982); *Crane v. State,* 401 So.2d 148 (Ala.Cr.App. 1981); *Collins v. State,* 391 So.2d 1078 (Ala.Cr.App. 1979); *McCord v. State,* 373 So.2d 1241 (Ala.Cr.App. 1979); *Williams v. State,* 340 So.2d 1144 (Ala.Cr.App.), cert. denied, 340 So.2d 1149 (1977); *Lee v. State,* 350 So.2d 743 (Ala.Cr.App. 1977). When constructive possession is relied on, the prosecution must meet a heavy burden; they must prove beyond a reasonable doubt that the accused had knowledge of the presence of the controlled substance. *Campbell, supra; Yarbrough v. State,* 405 So.2d 721 (Ala.Cr.App.), cert. denied, 405 So.2d 725 (Ala. 1981); *Grubbs v. State,* 462 So.2d 995 (Ala.Cr.App. 1984); *White v.*

State, 479 So.2d 1368 (Ala.Cr.App. 1985). Proof of constructive possession alone will not justify a conviction. *Cook, supra; Coker v. State*, 25 Ala.App. 191, 143 So.2d 206 (1932). The fundamental purpose for the knowledge requirement is founded on the legal theory that a person is cloaked with a presumption of innocence until proven guilty, and, consequently, the State, to obtain a conviction, must show that the evidence excludes all rational conclusions "except that of the Defendant's guilt." *Temple*, 366 So.2d 740 (Ala.Cr.App. 1978).

Knowledge can be inferred from the accused's exclusive possession, ownership, and control. *Temple, supra*. There was testimony that the Defendants had had trespassers on their property from time to time and that some things had come up missing from the farrowing shed. (R-277 to R-278 and R-287 to R-288). That shows that the Defendants did not have exclusive possession, ownership and control of the premises. The State did not attempt to prove otherwise. *Temple, supra*, goes on to state that when the accused does not have exclusive possession of the premises where a controlled substance is found, some other corroborating circumstances must exist before the accused can be convicted of illegal possession. "Where a person is in possession, but not exclusive possession of the premises, it may not be inferred that he knew of the presence of any controlled substance found there unless there are other circumstances tending to buttress this inference." *Korreckt v. State*, 507 So.2d 558 (Ala.Cr.App. 1986); *Temple v. State, supra*. Some evidence that connects the accused with the contraband is required. Guilty knowledge can be proved by evidence of acts, or conduct of accused, from which it may be fairly inferred that he knew of the existence of the contraband at the place where it was found. *Donahoo v. State*, 505 So.2d 1067 (Ala.Cr.App. 1986). The only evidence that even remotely connects the Defendants in this case to the marijuana is a dispute over some trails in the densely wooded area where the plots were found. (R-253 and R-268). The only attempt the State made to show evidence of trails was through the testimony of an ABI Agent, Charles West and ex-agent,

Stephen Lindsay. The trails they testified to were in an admittedly rural, marshy, densely-wooded area, where a machete was necessary to cut through the growth. (R-31 to R-32, R-68, R-102 to R-105, R-156 to R-159, R-197, R-204). There were also many animals in the woods. (R-156 to R-159). There was not, however, any pictures, notes, diagrams or contemporaneous records to show the location or existence of the "trails." (R-83 to R-85, R-159 to R-161). This testimony was insufficient to show constructive possession or knowledge.

There was a raincoat and a paper bag that could have belong to the Defendants found near the scene of the seizure. Both of which were like numerous similar items used in and around the Defendants home and farrowing shed. (R-274 to R-276, R-286 to R-287, R-297 to R-298). The State attempted to show knowledge through these two items. Once again, however, there was a notable lack of detail and accuracy surrounding the items. Although numerous pictures were taken at the scene of the seizure and introduced as evidence, no pictures, notes, drawings or contemporaneous records were made regarding the two key pieces of evidence which could have linked the Defendants to the marijuana. (R-83 to R-84, R-113 to R-118, R-121, R-128 to R-130, R-138 to R-141, R-143 to R-156, R-160 to R-161). In fact, the ABI agents defaced, altered and commingled the paper bags and wrote prejudicial remarks on them. (R-87, R-89 to R-90). Despite the numerous objections of Defendants counsel, these items were allowed into evidence. (R-84, R-87, R-90, R-112, R-121).

The State failed in every aspect to prove a prima facie case of constructive possession. The case at bar is similar to *Woolridge v. State*, 489 So.2d 703 (Ala.Cr.App. 1986); and *Crafts v. State*, 439 So.2d 1323 (Ala.Cr.App. 1983). In *Woolridge, supra*, several trails led from the defendant's trailer to woods where marijuana was discovered growing. Seeds were found in an oil can near the edge of the field about 75 yards from the trailer. There were also some scales and pills found inside the trailer. No one was ever found at the trailer or near the plot. The Court of Criminal Appeals held that there

was insufficient evidence to establish that the defendant was in constructive possession of the contraband. The instant case does not even rise to the level of *Woolridge, supra.* The "trails" are disputed and there was no clear evidence that they existed. The marijuana was much further away from the house (R-67 to R-258) (two hundred yards as compared to seventy-five) and in a densely-wooded area, and the only evidence even remotely linking is the raincoat and paper bag.

In *Crafts, supra,* the Court of Criminal Appeals again held that evidence was insufficient to convict the defendant. The local sheriff had been informed that the defendant was dealing in marijuana. A marijuana field was discovered in an aerial survey behind a barn, approximately 125-150 feet from the defendant's back porch. The defendant was not at home at the time of the seizure and was never seen at or near the marijuana. The marijuana was growing in between corn plants in the garden, and several plants were drying at the edge of the woods, twenty to fifty feet behind the garden. The Court said that "the evidence is notable for its lack of detail and for the absence of information connecting the defendant with the growing marijuana." *Crafts, supra,* at p. 1324. "Reduced to fundamentals, all the State showed was that the defendant's residence abutted land on which marijuana was growing." *Crafts, supra,* at p. 1325.

> Here, there was no showing that the marijuana plants were growing on the defendant's exclusively owned and occupied residential lot . . . There was no showing that the defendant owned and was in exclusive possession of the property on which the marijuana was growing. . . . *At best, the testimony in this case merely raises a suspicion that the marijuana belonged to the defendant. . . . No rule is more fundamental or better settled than that convictions cannot be predicted upon surmise, speculation, and suspicion to establish the accused's criminal agency in the offense charged.* . . . Here the fact that the marijuana plants were in close proximity to the defendant's residence and the Sheriff's testimony that he had been told that the defendant had been dealing in marijuana *merely showed a possibility that this defendant may have*

committed the offense. "However, the possibility that a thing may occur is not alone evidence even circumstantially, that the thing did occur." . . . . . Here, the facts and circumstances only give rise to a suspicion of guilt and are insufficient] to support the conviction. *Crafts, supra,* at p. 1325 (emphasis added).

Finally, the Court held that "although the evidence may have been sufficient to show potential control, there was no showing of the defendant's intention to exercise dominion and external manifestation of intent and control." *Crafts, supra,* at p. 1325.

In light of the standards set forth in *Crafts, supra,* the Defendants in our case are due a reversal of the trial court's decision. The proximity of the marijuana to the residence was much closer in *Crafts, supra,* than in the instant case. In *Crafts, supra,* the marijuana was in a relatively open area growing in a cultivated garden behind the barn, some 125 to 150 feet from the house. In this case, the marijuana was growing in a densely-wooded area some 580 feet from the house. Like *Crafts, supra,* the Defendants were never seen at or near the marijuana (R-18 to R-19, R-162, R-207 to R-214). In addition, no one was at home at the time of the seizure (R-64). The Defendants' conviction was based on speculation, suspicion and surmise, which, as noted above, is insufficient to support a conviction.

The Defendants were convicted on circumstantial evidence. A conviction may be had on circumstantial evidence *so long as that evidence is so strong and cogent as to show the defendant's guilt to a moral certainty. Tanner v. State,* 277 So.2d 885 (Ala. 1973) (emphasis added); *Hollenquest v. State,* 290 Ala. 146, 274 So.2d 613 (1973); *James v. State,* 22 Ala.App. 183, 113 So. 648 (1927). If circumstantial evidence fairly permits an inference consistent with innocence, it will not support a conviction. *Tanner, supra; Carr v. State,* 28 Ala.App. 466, 187 So. 252 (1939); *Cooper v. State,* 235 Ala. 523, 180 So. 102 (1938). In *Tanner, supra,* there were three pieces of circumstantial evidence: 1) the defendant was at the scene of the crime at the time a car was stolen, 2) his prior statement that he was going to "get" an automobile, and 3) his later

appearance at a friend's house with a car of the same description as the stolen automobile. The Alabama Supreme Court held that these three things were sufficient to convict the defendant. In our case, however, the Defendants did not have circumstantial evidence as strong as in *Tanner, supra.* The Defendants were never seen at or near the scene of the crime, (R-18 to R-19, R-162, R-207 to R-214) there were no "statements" which tended to show guilt, nor were the Defendants ever seen with the marijuana. (R-18 to R-19, R-162, R-207 to R-214).

> The humane provisions of the law are, that a prisoner, charged with a felony, should not be convicted on circumstantial evidence, unless it shows by a full measure of proof that the defendant is guilty. Such proof is always insufficient, unless it excludes, to a moral certainty, every other reasonable hypothesis, but that of the guilt of the accused. No matter how strong the circumstances, if they can be reconcile with the theory that some other person may have done the act, then the defendant is not shown to be guilty, by that full measure of proof which the law requires. . . . *Ex parte Acree,* 63 Ala. 234 (1897), and quoted in *Weeks v. State,* 428 So.2d 193 (Ala.Crim.App. 1983); *Cumbo v. State,* 368 So.2d 871 (Ala.Cr.App. 1979); *Ex parte Williams,* 468 So.2d 99 (Ala. 1985).

In *Ex parte Williams, supra,* the Alabama Supreme Court held that the evidence was *insufficient* to exclude every reasonable hypothesis, except that of the defendant's guilt, in the absence of any evidence placing the defendant at or near the store on the night of the burglary. The defendant's fingerprints were found on boxes of stolen film in an area of a store where the customers were not allowed. In the case at bar, the evidence does not even rise to that level. No fingerprints were found at all (R-123 to R-124, R-149 to R-151, R-228, R-234). *Williams, supra,* went on to hold that mere speculation, conjecture, or surmise that the accused is guilty of the offense does not support a conviction. *Smith v. State,* 345 So.2d 325 (Ala.Crim.App. 1976), cert. quashed, 345 So.2d 329 (Ala. 1977); *Colley v. State,* 41 Ala.App. 273,

128 So.2d 525 (1961). "Mere possibility, suspicion, or guesswork, no matter how strong, will not overturn the presumption of innocence." *Ex parte Williams, supra,* at p. 101; *Sauls v. State,* 29 Ala.App. 587, 199 So. 254 (1940); *Riley v. State,* 28 Ala.App. 389, 187 So. 247 (1938); *Rungan v. State,* 25 Ala.App. 287, 145 So. 171 (1932); *Guin v. State,* 19 Ala.App. 67, 94 So. 788 (1922). In the instant case, the Defendants were convicted on speculation, suspicion and surmise. Other than the raincoat and paper bag, there was no evidence to connect the Defendants with the marijuana. Both of these items are innocent and do not tend to support guilt. Raincoats and paper bags have no particular connection to cultivating marijuana, and are items used by people everyday in the ordinary course of business. They are not incriminating items special to the marijuana trade.

No pictures were taken of the location of the two key pieces of circumstantial evidence (R-137 to R-141). Evidence was burned and destroyed (R-108, R-163 to R-166, R-219 to R-220), altered, commingled and defaced (R-86 to R-87, R-89 to R-90, R-111 to R-122 and R-145). No surveillance was done at the time of the seizure (R-162, R-166 to R-172), nor was any one ever seen at or near the marijuana either at the time of the seizure (R-18 to R-19, R-162) or at the time of the late night surveillance (R-207 to R-214). No measurements or diagrams of the scene of the seizure or of the distance between the plots themselves and the plots and the house were done (R-181 to R-183, and R-210 to R-214). In fact, the agents did not even know how many plants they seized out of each plot (R-129).

In *German v. State, supra,* the Court stated: "Constructive possession may be determined by weighing those facts which tend to support the defendant's necessary control over the substance against those facts which demonstrate a lack of dominion and control." at p. 1140, citing *Roberts v. State,* 349 So.2d at 91 (Ala.Cr.App.), cert. denied, *Ex parte Roberts,* 349 So.2d 94 (Ala. 1977). In this case, the facts supporting the Defendants lack of dominion and control substantially outweigh the facts tending to support the Defendants necessary control.

The State simply failed in all aspects to prove constructive possession. There was no proof of: 1. actual or potential physical control; 2. intention to exercise dominion; and 3. external manifestations of intent and control, nor was there proof beyond a reasonable doubt that the Defendants had knowledge of the marijuana. Because the evidence presented by the State could not support a rational inference by the jury that the Defendants had knowledge of the contraband, the State failed to prove beyond a reasonable doubt that the Defendants had constructive possession of the marijuana. For the foregoing reasons, the Defendants conviction is due to be reversed.

ADVERSE RULINGS TO THE APPELLANT

1. R-49	Overruled Defendants' objection to improper predicate of evidence.
2. R-53	Overruled Defendants' objection to evidence.
3. R-65	Overruled Defendants' objection to relevant evidence.
4. R-84	Overruled Defendants' objection to improper predicate.
5. R-90	Overruled Defendants' objection to relevancy.
6. R-112-122	Overruled Defendants' objection to proper predicate.
7. R-235-247	Overruled Defendants' Motion for Judgment for Acquittal based on State's failure to prove a Prima Facie Case.
8. R-303	Overruled Defendants' Motion for Judgment of Acquittal.
9. R-309	Overruled Defendants' objection to improper to jury arguments.

REQUEST FOR ORAL ARGUMENT

The appellant requests oral argument in this cause as it is a matter of utmost importance to the people of this State.

CONCLUSION

For the foregoing reasons, Appellant respectfully demands that this Honorable Court reverse the lower court's conviction of the Appellants and remand for consideration in accordance with these arguments.

/s/ David S. Luker

DAVID S. LUKER
ATTORNEY FOR APPELLANTS
Donald B. Lander/
Camilia S. Lander

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Appellant upon the Attorney General, Don Siegelman, for the State of Alabama, via United States Mail, postage prepaid and properly affixed, on the 1st day of December, 1988.

/s/ David S. Luker

DAVID S. LUKER
ATTORNEY FOR APPELLANTS
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-666

Supreme Court, U.S.
FILED
FEB 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1235

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DONALD B. AND CAMILIA S. LANDER,

PETITIONERS,

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

35 pp

QUESTIONS PRESENTED

1. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a federal constitutional claim by a state convict which is raised for the first time in this Honorable Court?

2. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a claim by a state convict, which could have been but was not presented to the highest state court in a manner which permitted that court to review the claim?

3. Do errors in the application of state laws constitute a denial of equal protection of the laws?

THE PARTIES

In the Circuit Court of Autauga County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Donald B. and Camilia S. Lander, who are Petitioners herein, as defendants, Appellant and Petitioners, respectively, and the State of Alabama, who is Respondent herein, as Plaintiff, Appellee, and Respondent, respectively.

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED.....	ante I
THE PARTIES.....	ante II
TABLE OF CONSTITUTIONAL PROVISIONS...	ii
TABLE OF CASES.....	ii
TABLE OF STATUTES.....	iii
TABLE OF RULES OF COURT.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED...	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	5
ARGUMENT.....	12
CONCLUSION.....	15
APPENDIX.....	16
CERTIFICATE OF SERVICE.....	29

TABLE OF CONSTITUTIONAL PROVISIONS

	PAGE(S)
United States Constitution, Amendment Fourteen.....	1

TABLE OF CASES

	PAGE(S)
Beck v. Washington, 36 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962).....	6, 14
Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).....	13
Exxon Corp. v. Eagerton, 462 U.S. 176, 76 L.Ed.2d 497, 103 S.Ct. 2296 (1983)....	13
Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958)....	13
Lander v. State, ___ So.2d ___ (Ala. Crim. App., May 26, 1989).....	1
Martin v. Walton, 368 U.S. 25, 7 L.Ed.2d 5, 82 S.Ct. (1961).....	14

TABLE OF CASES CONTINUED

PAGE(S)

Rotary International v. Rotary Club,
481 U.S. 537, 95 L.Ed.2d
474, 107 S.Ct. 1940(1987)..... 12, 15

Slagle v. Ohio,
366 U.S. 259, 6 L.Ed.2d
277, 81 S.Ct. 1076 (1961)..... 13

Webb v. Webb,
451 U.S. 493, 68 L.Ed.2d
392, 101 S.Ct. 1889 (1981).... 12

TABLE OF STATUTES

Code of Alabama, 1975,

Title 20, Section 20-2-80.... 2

United States Code,

Title 28, Section 1257..... 1, 13

TABLE OF RULES OF COURT

Alabama Rules of Appellate Procedure,

Rule 39..... 5

OPINIONS BELOW

The opinions and orders of Alabama Appellate Courts in the Petitioners' case, affirming their convictions, denying rehearing and denying certiorari are not yet reported but will be reported as follows: Landers v. State, ___ So.2d ___ (Ala. Crim. App. May 26, 1989); cert. den. No. 88-1328 (December 1, 1989)

JURISDICTION

The petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making an alleged claim under the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are involved in this cause.

STATEMENT OF THE CASE

The Petitioners, Camilia Saliba Lander and Donald Boyd Lander, were separately indicted by the Grand Jury of Autauga County, Alabama, at the Grand Jury's Spring, 1988, Term for trafficking in cannabis in violation of Section 20-2-80(1)(a), Code of Alabama, 1975. (C.R.pp.3-6)

On March 8, 1988, the Petitioners were arraigned and entered pleas of not guilty. (C.R.pp.192-195)

On May 11, 1988, the causes came on for trial before Honorable John B. Bush, a Circuit Judge and a Jury. The Petitioners were represented by their Attorney, Honorable David S. Luker, and the State was represented by its District Attorney, Honorable Janice Clardy and her Chief Assistant, Honorable John Thornton. (C.R.pp.192 and 194 and Tr.1)

On the trial of the cause, it was proven without conflict that several large fields of marijuana and a marijuana processing structure were located on land owned by the Petitioners and occupied by them as a residence. It was stipulated that the police had seized some 102.8 ounces (6.425 pounds) of marijuana from the Petitioners' land. (C.R.118) However, the Petitioners claimed that they had no knowledge of the marijuana growing operation on their land. (Transcript generally)

On May 12, 1988, the Jury, having heard the evidence, arguments of counsel and charge of the Court, found the Petitioners guilty of trafficking in marijuana as charged in the indictments. (C.R.pp.192-195 and Tr.p.328)

On June 24, 1988, the Petitioners were adjudged guilty in accordance with the verdict. Petitioner Camilia Saliba Lander was sentenced to five years imprisonment, a fine

of $25,000.00 and ordered to pay $1,500.00 to the victims' compensation fund. Petitioner Donald Boyd Lander was sentenced to fifteen years imprisonment, a fine of $25,000.00 and ordered to pay $1,500.00 to the Victims' Compensation Fund. (C.R.pp.192-195)

Appeal followed.

On May 26, 1989, the Court of Criminal Appeals of Alabama affirmed the Petitioners' convictions. (Appendix "A", to the petition.) On June 9, 1989, the Petitioners applied for rehearing, but the same was overruled on June 30, 1989.

The Petitioners sought review in the Alabama Supreme Court by certiorari. The Appellant's certiorari petition did not meet the formal requirements of Rule 39(c), Alabama Rules of Appellate Procedure. (A.R.A.P.) Appendix "A" to this brief. Although the Petitioners raised three issues relating to the sufficiency of the evidence, none were

shown to be within the classifications set out in Rule 39(c), A.R.A.P. Nowhere did the petition present or even mention an equal protection claim. On December 1, 1989, the Alabama Supreme Court denied the writ.

STATEMENT OF THE FACTS

The Petitioners' convictions are based on the following facts:

Certain facts were and are undisputed and there is little need to burden the Court with a detailed recitation of evidence proving what is not at issue. Therefore, briefly:

On August 24, 1987, Corporal Roy Sumja, of the Alabama State Troopers, was flying, by helicopter, from Dannelley Field in Montgomery County to the Chilton-Perry County line, where some marijuana fields were reported. However, before reaching the intended search area, he observed a rather large patch of marijuana plants on Petitioners' land in

Autauga County. The plants were vary tall, 12 to 18 feet in height. Sumja contacted his ground unit, operated by A.B.I. Investigator Charles West. West entered the property through the Petitioners' driveway. Unable to raise anyone at the Petitioners' house, West passed through their yard and garden and discovered a well used trail which led to a complex of four marijuana filed. West also discovered a green-house-like drying shed and clear evidence that marijuana was being processed for illicit sale and use. Other investigators converged on the scene. Most of the marijuana was burned, but a quantity was seized for use as evidence. (Tr.pp.7-33 and 55-185)

It was stipulated that the material seized was 102.8 ounces (6.425 pounds) of marijuana. (C.R.p.118)

Ultimately, the Petitioners admitted under oath that they own and lived on this

land. (Tr.pp.271-302) However, the contention raised on appeal was that the State did not make out a prima facie case that the land where the marijuana was growing was that of the Petitioners. This fact was proven by the following evidence:

A. Since July 1, 1983, the property had been assessed for purposes of taxation to the Petitioners. (C.R.174-176 and 180 and Tr.pp.33-46 and 51-55)

B. The property had been deeded to the Petitioners on July 1, 1983, and there was no recorded transfer of the property by them to some other person. (C.R.177-179 and Tr.46-54)

C. Fred David McGee who lives at Route 4, Box 442, Prattville, Alabama, was a neighbor of the Petitioners. He and the Petitioners share the same access drive, and their mail boxes are together on the public road. The Petitioners' mail box is marked with their nicknames, "Cam" and "Don". Mr.

McGee has seen the Petitioners drive back and forth on the access drive many times over the three years prior to trial. Although the two houses are some distance apart and Mc. McGee seldom goes up the road as far as the Petitioners' house, on the few occasions he had done so, he has observed the Petitioners at their house. (Tr.pp.185-193)

D. Inside the marijuana drying shed the Investigators found a small bag (State's Exhibit 41) inside a larger bag (State's Exhibit 40). State's Exhibit 41 had Petitioner Camilia Lander's nickname, "Cam", written on it. (Tr.pp.85-87)

E. Along the complex of trails connecting the four marijuana fields with each other and the Petitioners' garden, a yellow raincoat was located. On the back of the raincoat was embossed, "Don L." (R.pp.79-81)

If the Petitioners ultimately admitted owning and occupying the property, they denied

any knowledge of the marijuana growing thereon. The State's evidence of scienter was strong, perhaps conclusive, but, not withstanding his denials of knowledge, the testimony of Petitioner Donald Landers in some ways strengthened the State's position. However, the issue of a prima facie case must be decided on the basis of the State's evidence alone. Therefore, this evidence will be digested separately from that of Petitioner Donald Lander.

A. We again call the Court's attention to the evidence we digested above, proving that the Petitioners owned and occupied the property.

B. We again call the Court's particular attention to the evidence recited under II, "D" and "E", above.

C. The marijuana growing operation was quite extensive involving four separate fields and a drying shed. (Tr.pp.7-33, 55-185, and 193-223)

D. The marijuana in the fields was quite tall, some 5 to 18 feet tall. (Tr.pp.11 and 198)

E. The nearest marijuana field was only two hundred (200) yards from the Petitioners' house and the trails began at the Petitioners' garden at a point one hundred fifty (150) yards from the house. (Tr.pp.65 and 197)

F. The area of the marijuana fields was covered with heavy brush and could be accessed only by a complex of trails. These were clear, well used trails. Human footprints could be observed on them, indicating recent use by humans. The complex of trails had two terminals: one at either end of the Petitioners' garden. (Tr.pp.65-69, 101-106 and 197-203)

Although Petitioner Don Lander denied any knowledge of the marijuana growing and processing operation on his property, his

testimony is as a whole rather hard to swallow. The evidence showed without conflict that this wooded area held game, indeed the Defense tried to show that the trails giving access to the marijuana fields were made by deer, turkeys, etc. (Tr.pp.158-159) Landers claimed he often had to drive stray hunters from his land. (Tr.277) Landers hunts deer and turkey. (Tr.p.285) Apparently, he only hunted on other peoples' land. Lander claimed that, in addition to the hunters, previously mentioned, he often had to force teenage dirt bikers from the property. (Tr.p.277) He claimed that the embossed raincoat and bag marked "Cam" were stolen from a storage shed on his property. (Tr.pp.271-293)

ARGUMENT

We see no point in burdening this Honorable Court with extended argument on obvious points.

The Alabama Supreme Court was given no opportunity to consider the equal protection claim which the Petitioners seek to raise here. Therefore, certiorari, under 28 U.S.C. 1257, does not lie to review it. Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Rotary International v. Rotary Club, 481 U.S. 537, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987).

The Petitioners made no effort to comply with the requirements of Rule 39 A.R.A.P, appendix. Thus, they denied the Alabama Supreme Court of any real opportunity to review the claims they did present. Therefore, the claim was not presented to the State Supreme Court and certiorari, under 28 U.S.C. 1257, does not lie to review it.

Cardinal v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969)

Under the plain words of 28 U.S.C. §1257(3), the State Supreme Court must have had the opportunity to address the federal question on which review is sought here. Where, as here, a state supreme court does not address such an issue, it is presumed that the issue was not properly before that Court. Rotary International v. Rotary Club, 481 U.S. 537, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987); Exxon Corp. v. Eagerton, note 3, 462 U.S. 176, 181, 76 L.Ed.2d 497, 504, 103 S.Ct. 2296 (1983) n. 3; Hanson v. Denckla, 357 U.S. 235, 244, 2 L.Ed.2d 1283, 1292, 78 S.Ct. 1228 (1958). Slagle v. Ohio, 366 U.S. 259, 264, 6 L.Ed.2d 277, 281, 81 S.Ct. 1076 (1961). However, no such presumption is necessary here, since the Petitioners made no pretense of presenting a federal claim in state court.

Addressing the merits briefly, it is obvious that the Petitioner is arguing that possible misapplications of state law in other cases have deprived him of equal protection of the law. This does not even present a claim of constitutionally prohibited discrimination. Beck v. Washington, 369 U.S. 541, 554-555, 8 L.Ed.2d 98, 110 82 S.Ct. 1575 (1962); Martin v. Walton, 368 U.S. 25, 26, 7, L.Ed.2d 5, 6, 82 S.Ct. 376 (1961).

CONCLUSION

In conclusion, the Respondent respectfully submits that the claim the Petitioner seeks to raise is not properly before the Court and is, in any event, a claim with no basis in fact or law.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

P. David Bjurberg

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

APPENDIX

RELEVANT ALABAMA COURT RULES

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEALS

(a) Method. Decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point, issue,or decision complained of, except that, in the case of a pre-trial appeal by the state in a criminal case, either party may petition for writ of certiorari without having first applied for a rehearing in the court of criminal appeals. Payment of the amount prescribed in Rule 35A(3) shall be made to the clerk of the supreme court at the time the petition for writ of certiorari is filed.

(b) Time. The petition for writ of certiorari, with an accompanying brief, shall be filed with the clerk of the supreme court pursuant to Rule 25(a), within 14 days (2 weeks) after the decision of court of appeals on the application for rehearing, except that in the case of a pre-trial appeal by the state in a criminal case, a petition for writ of certiorari must be filed within 7 days (1 week) of the judgment of the court of criminal appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless counsel who represented the appellant on the original appeal has been

replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution;

(2) From decisions that affect a class of constitutional, state, or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the Supreme Court or the courts of appeal; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision of the Supreme Court with which the conflict is alleged; or if the conflict is with a prior decision of the court of appeals, the conflicting passages must be quoted; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling Supreme Court cases overruled ~~which~~ were followed in the decision of the court of appeals.

(d) Form of Petition. The petition shall be on legal-size paper and shall contain:

(1) The style of the case (the same as in the court of appeals), the name of the

petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based; and,

(4) A copy of the opinion of the court of appeals shall be attached to the petition as an exhibit.

(e) Service. Nine copies of the petition and briefs shall be filed with the clerk of the Supreme Court, one copy with the clerk of the appropriate court of appeals, and one copy shall be served on each party to the proceeding in the court of appeals including those not joining in the petition.

(f) Briefs. Petitioner's brief shall be on the same size paper and bound as briefs for appeals and shall accompany the petition for writ of certiorari. No more briefs will be required of petitioner, although he may file an answering brief within 14 days (2 weeks) --or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receipt of respondent's brief. Within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case within 7 days (1 week)--after service of the petition and brief by petitioner, the respondent may file an initial brief limited solely to the issue of whether or not any of the grounds set forth in (c) (1)-(5) authorize the granting of a writ. Thereafter, if the writ should be granted, the respondent may file a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of

certiorari, within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after notice that the writ has been granted. Nine copies of the reply brief shall be filed with the clerk of the supreme court and one copy shall be served on the petitioner or his attorney. No more shall be required of respondent.

The work "brief" as used in this rule includes an appendix where brief and appendix were employed by the party in the court of appeals.

(g) Action on Petition. If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the clerk of the appropriate court of appeals. The record, one copy of the

briefs,and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The case shall stand for submission as herein provided.

(h) Oral Argument. There will be no oral argument on preliminary examination. In the event the writ is granted, oral argument may be requested in writing by either party within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receiving notice of the granting of the writ. A copy of the request shall be served on the adverse party.

(i) Submission. If either party shall have made known a desire for oral argument, the clerk of the supreme court shall endorse that fact on the proper docket and, if oral argument is not determined under the criteria of Rule 34 to be unnecessary, shall set the case down for oral argument not less than 14

days (two weeks) after notifying the parties, or their attorneys or record, in writing of such setting. If neither party shall have requested oral argument,as herein provided, or if the supreme court shall have determined oral argument to be unnecessary, the clerk of the Supreme Court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case upon the record, briefs, and appendices, if any.

(j) Rehearing. No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied.

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement

of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error of defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason

thereof, whenever such error has or probably has adversely affected the substantial rights of petitioner.

RULE 40. APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1 week)after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief

opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court.

CERTIFICATE OF SERVICE

I, P. David Bjurberg, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 12 day of February, 1990, I did serve the requisite number of copies of the foregoing on the Attorney for Donald B. and Camilia S. Lander, Petitioners, by mailing the same to said Attorney, first class postage prepaid and addressed as follows:

Honorable David S. Luker
Attorney at Law
Luke and Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, Alabama 35203

P. David Bjurberg

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL

1790P

Supreme Court, U.S.
FILED
MAR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1235

IN THE

Supreme Court Of The United States

October Term 1989

DONALD B. AND CAMILIA S. LANDER,
Petitioners

vs.

THE STATE OF ALABAMA,
Respondent

PETITIONERS' REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION

DAVID S. LUKER
Luker and Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, Alabama 35203
(205) 251-6666

Attorney for Petitioners Lander

OF COUNSEL:

Tamera K. Erskine
Luker & Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, Alabama 35203
(205) 251-6666

QUESTION FOR REVIEW

I. WHETHER THE PETITIONERS WERE DENIED EQUAL PROTECTION OF THE LAW DUE TO THE STATE OF ALABAMA'S FAILURE TO FOLLOW THEIR OWN STATE LAWS ON CONSTRUCTIVE POSSESSION OF CONTROLLED SUBSTANCES.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 3

1. Whether the Petitioners were denied equal protection of the law due to the State of Alabama's failure to follow their own laws. 3

ARGUMENT 3

CONCLUSION 5

CERTIFICATE OF SERVICE 5

TABLE OF AUTHORITIES

Statutes: *Page*

28 U.S.C. § 1257(3) 2

U.S. Constitution:

Fourteenth Amendment 2

Other:

Alabama Rules Appellate Procedure 4

No. 89-1235

IN THE

Supreme Court Of The United States

October Term 1989

DONALD B. AND CAMILIA S. LANDER,
Petitioners

vs.

THE STATE OF ALABAMA,
Respondent

PETITIONERS' REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION

Petitioners[1] respectfully pray that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court on December 1, 1989, denying review of the issues raised concerning their convictions in this case, previously affirmed with opinion by the Alabama Court of Criminal Appeals by Judgment of May 26, 1989.

[1]Petitioners' undersigned counsel respectfully submits that to the best of his knowledge the style of this case accurately reflects all parties having an interest in its outcome.

OPINIONS BELOW

Petitioners timely appealed their judgments of convictions and sentences to the Alabama Court of Criminal Appeals. By Judgment of May 26, 1989, the Alabama Court of Criminal Appeals affirmed their convictions and sentences with an opinion. Petitioners timely filed an Application for Rehearing in the Alabama Court of Criminal Appeals. This Application for Rehearing was denied without opinion by the Alabama Court of Criminal Appeals on June 30, 1989.

Petitioners timely filed a Petition for Writ of Certiorari to review the Judgment of the Alabama Court of Criminal Appeals in the Alabama Supreme Court. The Alabama Supreme Court by order of December 1, 1989, denied the Writ.

These orders appear in full in the Appendix submitted with the Petitioners' Petition for Writ of Certiorari previously submitted to this Honorable Court.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3). This Petition was timely filed within sixty days of the date of the Alabama Supreme Court's Judgment and Order of December 1, 1989.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or inunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

For purposes of this Reply Brief, the Petitioners adopt the Statement of the Case set forth in their Petition for Writ of Certiorari previously filed with this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. Petitioners Were Denied Equal Protection Of The Law Due To The State Of Alabama's Failure To Follow Their Own State Law On Constructive Possession Of Controlled Substances.

For purposes of this Reply Brief, the Petitioners adopt their reasons for granting the Writ as laid out in their previously filed Petition for Writ of Certiorari to this Honorable Court.

ARGUMENT

The Petitioners, Donald B. and Camilia S. Lander, feel that they must respond to the Respondent's Argument in Opposition to the Petition filed by the State of Alabama on the 12th of February, 1990. In their argument, the Respondents state, "The Alabama Supreme Court was given no opportunity to consider the equal protection claim which the Petitioners seek to raise here." (Page 12, Respondent's Brief in Opposition). The Alabama Supreme Court, however, was given ample opportunity to respond and consider the equal protection claim. These arguments were laid out by the Petitioners in their Petition for Writ of Certiorari filed with the Alabama Supreme Court on July 14, 1989. (A-2 through A-11, Appendix to Petition for Writ of Certiorari to the Alabama Supreme Court). The Petitioners further addressed these issues in the accompanying brief filed with the Petition for Writ of Certiorari filed with the Supreme Court of Alabama. The Respondents state on Page 12 of their Argument in Opposition to the Petition that "the Petitioners made no effort to comply with the requirements of Rule 39

A.R.A.P." This argument is clearly in error. The Petitioners followed every procedural requirement of the *Alabama Rules of Appellate Procedure*. The Petitioners timely filed an appeal to the Alabama Court of Criminal Appeals on January 3, 1989, pursuant to the *Alabama Rules of Appellate Procedure* 31. The Alabama Court of Criminal Appeals affirmed the trial court in a written opinion released on May 26, 1989. (Appendix A-12, Petition for Writ of Certiorari to the Alabama Supreme Court). The Petitioners timely filed an Application for Rehearing with the Alabama Court of Criminal Appeals pursuant to the *Alabama Rules of Appellate Procedure* 40. The Application for Rehearing was denied without opinion on June 30, 1989. (Appendix A-19, Petition for Writ of Certiorari to the Alabama Supreme Court). The Petitioners then timely filed a Petition for Writ of Certiorari to the Alabama Supreme Court pursuant to the *Alabama Rules of Appellate Procedure* 39, which was denied without opinion on December 1, 1989. (Appendix A-1, Petition for Writ of Certiorari to the Alabama Supreme Court). Rule 39(j) to the *Alabama Rules of Appellate Procedure* states: (j) *Rehearing* — no application for rehearing shall be received in the Supreme Court if the Petition for Writ of Certiorari is denied." Since the Landers' Petition for Writ of Certiorari was denied by the Alabama Supreme Court, the Petitioners timely filed a Petition for Writ of Certiorari to this Honorable Court, pursuant to the *United States Supreme Court Rule* 20.1 and 20.4. The Petitioners fail to see how the Respondent can make a claim that they have failed to comply with the requirements of Rule 39 of the *Alabama Rules of Appellant Procedure*. The Respondent's claim is therefore unmeritorious.

CONCLUSION

For these reasons, both separately and severally, the Petitioners respectfully submited that their claim was properly before the Alabama Supreme Court, and is therefore properly before this Honorable Court. The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court.

Respectfully sbumitted,

DAVID S. LUKER
Luker and Brewer
Barrister Hall
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

OF COUNSEL:
TAMERA K. ERSKINE
Luker & Brewer
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Petitioners' Reply Brief to Respondent's Opposition to Petition on P. David Bjurbery, Assistant Attorney General, Alabama State House, 11 South Union Street, Montgomery, AL 36130, via U.S. Mail, postage prepaid and properly affixed this the _____ day of _____, 1990.

DAVID S. LUKER